IN THE COURT OF APPEAL OF NEW ZEALAND

CA148/2014
[2014] NZCA 631

	BETWEEN	WELLINGTON CITY COUNCIL Appellant
	AND	COLIN JAMES DALLAS Respondent

Hearing:	8 September 2014
Court:	French Winkelmann and Asher JJ
Counsel:	D J Heaney QC and A K Hough for Appellant D A Laurenson QC and J D Haig for Respondent
Judgment:	19 December 2014 at 10.00 am

INTERIM JUDGMENT OF THE COURT

A The appeal is allowed to the extent described in [59] of this judgment.

B The parties are to provide further submissions regarding the issue of apportionment, in accordance with [57]–[58] of this judgment.

REASONS OF THE COURT

(Given by Winkelmann J)

Introduction

[1] This appeal concerns a leaky home built in the early years of the last decade by a construction company, Kingdom Residential Housing Ltd (Kingdom). The owners of the house, the plaintiffs, sued Wellington City Council (the Council) for

compensation for defects in the house's construction.[1] The Council in turn sued third parties involved in the construction process including Mr Colin Dallas, the former managing director of Kingdom.

[2] Prior to the hearing the Council settled with the owner plaintiffs, paying $670,000 and admitting negligence in inspecting and certifying the original construction. The Council was then able to recover some of the $670,000 through settlement with other third parties, but proceeded to trial with its claim against Mr Dallas. It sought a contribution to the balance of its outlay, which by the time of trial was $546,000. The Council pursued claims in negligence, negligent misstatement and breach of s 9 of the Fair Trading Act 1986 against Mr Dallas.

[3] Mallon J dismissed all of the Council's claims.[2] The Council now appeals that judgment, limiting its appeal to the Judge's finding in respect of the Fair Trading Act cause of action. It says that the Judge erred in not finding Mr Dallas in breach of s 9 of the Fair Trading Act because statements made by him in a letter to the Council about work done were patently misleading and deceptive, and the Council relied on them and thereby suffered loss.

Background facts

[4] The house in question was built for Mr and Mrs Craig in 2001, and completed in early 2002. Mr Dallas was not involved in the construction. The Council issued an interim Code Compliance Certificate (CCC) on completion. In January 2004 Mr Craig approached the Council to obtain a final CCC prior to sale. Following a site inspection the Council identified a number of matters that had to be addressed before the certificate could be issued. Mr Craig made contact with Mr Ledbury, a building supervisor at Kingdom, and work was carried out by Kingdom to address the Council's list.

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1 Kingdom was by that time struck off the Companies Register.

2 *Derwin v Wellington City Council* [2014] NZHC 341 [High Court judgment]. Having settled, there was no appearance for the plaintiffs Patrick Dean Derwin and Rama Diar, or two third parties, Alchemy Engineering and Design Ltd, and Builders Plastics Ltd. This left only the Council, as defendant, and Mr Dallas as first third party, who are the two parties to this appeal.

[5] The Council inspected the site again in September 2004. Present at the inspection were Council representatives Messrs Geraghty and Tily, along with Messrs Craig, Ledbury and Dallas. On 28 September 2004, the Council wrote to Mr Craig listing a further 14 items as to which "remedial work and documentation will be required". It said that the items needed to be "completed to the Council's satisfaction" and that it would need to be satisfied on reasonable grounds that all building work complied with the Building Act 1991 and Building Code 1992 before the requested CCC would be issued. The material part of the letter was as follows:

> [Item 2:] Where roofs end within adjacent walls, a "kick out" is required at the end of the apron flashing to direct water out on to the roof away from the wall cladding.
>
> [item 3:] During the inspection, it was noted that the top surfaces of the items listed below do not have a minimum slope of 1 in 10 as required by the manufacturer:
>
> - the roof parapets.
>
> - the deck safety barriers enclosed with harditex.
>
> - the deck upstands that provide fixing for the glazed safety barriers.
>
> It was also noted that the glazed safety barrier fixing base plates have been fixed through the top and side of the deck surface, and a storage container has been built on the mid level deck outside the dining room.
>
> Provide details for the Council, outlining the method of achieving weathertightness to these areas.
>
> …
>
> [Item 6:] It has been noted that there was a moisture ingress problem with the aluminium window joinery. Provide the Council with a report from the joinery manufacturer detailing the cause of the moisture ingress, and the remedial work that was undertaken to rectify it.
>
> [Item 7:] Provide a written statement from a suitably qualified person commenting on the impact the leaking windows had on the structural integrity and durability of the timber framing supporting these windows.
>
> …

[6] Mr Craig contacted Mr Dallas for help in resolving the outstanding issues. Mr Dallas in turn contacted contractors, suppliers and manufacturers to request producer statements. He also followed up a query with his colleague, Mr Ledbury, about the leaking windows. Kingdom then sent a letter to the Council dated

21 February 2005, signed by Mr Dallas as managing director, which is the letter in which it is said that the misleading statement was made. The material part of the letter was as follows:

> In response to your letter dated the 28th of September 2004 we have now obtained the relevant information needed to proceed with the issuing of a C.C.C for the Craig residence …
>
> I would like to arrange a time on site ... to meet with you to go over this matter. It would be greatly appreciated if you could get back to me with a suitable time
>
> I have worked through your letter and have numbered your points along with the information needed as follows:
>
> 1. Completed by KRH Plumber
> 2. Completed by KRH Plumber
> 3. Information provided by Fosroc
> 4. Council has this information which was provided by owner
> 5. Council has this information which was provided by owner
> 6. Information provided by First Windows
> 7. No rotting was visible nor does it show any signs now, including a moisture test that was taken.
> 8. Carters written timber quote (chemical free as per all other jobs) accepted by the building industry at the time of construction and consent
> 9. Completed by KRH
> 10. Fosroc durability statements (see attached)
> 11. Builders Plastics statement
> 12. Butyl statement (see attached)
> 13. Fosroc durability statement (see attached)
> 14. KRH to remove this bead
>
> It should also be noted that although we have not complied with the manufacturers specifications, we have complied with the building act where by preventing the penetration of water could cause under dampness or damage to the building elements. This has been achieved by the liquid moisture barrier that is visible, and can be seen by on site inspection.
>
> Please also note that the major problem which occurred with this house was a result of the hundred year storms of which we had three or four during 2004, along with almost every other house in the Wellington region to have suffered water ingress during that difficult period.
>
> Thank you for your time taken over this matter, should you have any queries please don't hesitate to contact me at the office

[7] There were a number of attachments to the letter, one a letter dated 17 February 2005, again on Kingdom's letterhead and signed by Mr Dallas as managing director. In that letter Mr Dallas said:

> This letter is to confirm that as a qualified Registered Master Builder I am commenting on the impact of a leaking window at the above address.
>
> As far as I am aware, structural integrity, and durability has not been impaired, nor has there been any signs that would indicate that this is likely to cause concern in the future. The water damage during this flood was dried out with commercial equipment and all materials were moisture tested prior to reinstatement of wall linings etc. This area was no more than half a square metre in total.
>
> I trust this satisfies your concern, should you have any queries please don't hesitate to contact me at the office

[8] Mr Dallas' evidence was that he relied on Mr Ledbury for the information he provided to the Council in the 17 and 21 February letters.

[9] There was a further site meeting on 3 March 2005, attended by two Council representatives, this time Messrs Cody and Geraghty, and also Messrs Dallas and Craig. None of the attendees called to give evidence remembered any specific information about that meeting and there was no record kept of discussions.

[10] The Council issued a final CCC later that month. The property was sold to the owner plaintiffs in July 2005. They later discovered their home was a leaky building and that there had been a number of defects in the construction methods employed. These included that the kick outs had not been installed in accordance with the Council's request. Instead, a sealant had been used to achieve weather tightness.

[11] The relevant legislation for the purposes of the claim was the Building Act 1991. Under that Act:

(a) building work must "comply with the Building Code to the extent required by this Act";[3]

(b) building work is to be carried out in accordance with building consents;[4] and

(c) the Council must issue a CCC "if it is satisfied on reasonable grounds that the building work complies with the Building Code".[5]

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3 Building Act 1991, s 7(1).
4 Section 32.
5 Section 43(3)(a).

[12] The Building Code is a schedule to the Building Regulations 1992. It sets function and performance requirements that building work must meet. All experts who gave evidence at the High Court trial agreed that moisture had entered the dwelling and that this was a breach of E2 of the Building Code.[6] The subsequent damage caused as a result of the defects had resulted in non-compliance with B2 of the Code in respect of the cladding and the timber framing elements.[7]

[13] In support of its Fair Trading Act claim against Mr Dallas, the Council said that Mr Dallas' letter of 21 February 2005 contained two misrepresentations. First, it stated that the kick outs had been "Completed by KRH Plumber" when they had not been. Secondly, it said that the house complied with the Building Act, when due to leaky building defects the dwelling was not in compliance with the Act or Code. Those misrepresentations resulted in the Council being misled as to the existence of the kick outs and general compliance with the Building Act. It issued the CCC relying on those misrepresentations, and suffered loss as a result.

[14] In the High Court it was accepted that there were several defects in construction, all of which allowed water to enter the structure of the house. Counsel in this Court were agreed that the appeal should proceed on the basis that the failure to install the kick outs as stipulated for in the Council's letter of 28 September 2004 was responsible for the whole of the damage. They agreed that if there were no other defects, the whole of the building would still have had to be re-clad.

The High Court Judge's findings

[15] The Judge rejected the Fair Trading Act claim for the following reasons material to this appeal:[8]

> (a) It was not reasonable for [the Council] to rely on the information provided by Mr Dallas about the kick outs. The response was ambiguous and lacked detail and a site meeting (at which the kick outs would be visible) was proposed.
>
> (b) Mr Dallas' assertion that the building code was met related to the parapets. He provided the basis on which that assertion was made.

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6 E2 of the Code concerns external moisture ingress.
7 B2 of the Code concerns durability.
8 High Court judgment, above n 2, at [102]–[103].

> It has not been shown that there was anything misleading in this response.
>
> …
>
> (d) Mr Dallas made it clear that he personally was not aware of any structural integrity or durability impairment. …
>
> Additionally Mr Dallas' conduct was not a material cause of [the Council]'s loss. [The Council] accepted liability in respect of the kick outs. Mr Dallas did not assert that he had installed the kick outs. He said that the work was done by Kingdom's plumber. He anticipated [the Council] would inspect the work. [The Council] did so.

[16] The Council says that the trial Judge erred in her factual findings that the 21 February letter contained no misleading statements. This flowed from the fact that she overlooked that misleading or deceptive conduct does not have to be the sole cause, it need only be an effective cause, of the claimant's loss of damage. The Council also submits that the Judge erred in her finding that Mr Dallas' conduct was not a material cause of the Council's loss.

Section 9 of the Fair Trading Act

[17] Section 9 of the Fair Trading Act provides:

> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[18] The first question to be asked is whether a reasonable person in the Council's situation, with the characteristics of the Council that Mr Dallas knew or ought to have known, would likely have been misled or deceived by the statements.[9] It is not necessary to prove that the Council was in fact misled to prove a breach of s 9.[10] As Mr Dallas submitted, the relevant characteristics for this Council include that it was fulfilling duties and exercising powers under the Building Act to administer, enforce and certify construction work in relation to the Building Code.

[19] If a breach of s 9 is established, consideration then turns to whether the Council has suffered loss by reason of the breach and if so, whether the Court should

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9 *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [28].
10 At [28] and n 17.

order Mr Dallas to pay all or some of the loss or damage to the Council.[11] Section 43 of the Fair Trading Act provides:[12]

> **43 Other orders**
>
> (1) Where, in any proceedings under this Part of this Act, or on the application of any person, the Court finds that a person, whether or not that person is a party to the proceedings, has suffered, or is likely to suffer, loss or damage by conduct of any other person that constitutes or would constitute—
>
> (a) A contravention of any of the provisions of Parts 1 to 4 of this Act; or
>
> (b) Aiding, abetting, counselling, or procuring the contravention of such a provision; or
>
> (c) Inducing by threats, promises, or otherwise the contravention of such a provision; or
>
> (d) Being in any way directly or indirectly knowingly concerned in, or party to, the contravention of such a provision; or
>
> (e) Conspiring with any other person in the contravention of such a provision—
>
> the Court may (whether or not it grants an injunction or makes any other order under this Part of this Act) make all or any of the orders referred to in subsection (2) of this section.
>
> (2) For the purposes of subsection (1) of this section, the Court may make the following orders—
>
> …
>
> (d) An order directing the person who engaged in the conduct, referred to in subsection (1) of this section to pay to the person who suffered the loss or damage the amount of the loss or damage:

[20] Section 43 requires a "common law practical or common-sense concept of causation".[13] In *Red Eagle*, the Supreme Court put the matter as follows:[14]

> The impugned conduct, in breach of s 9, does not have to be the sole cause, but it must be an effective cause, not merely something which was, in the end, immaterial to the suffering of the loss or damage.

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11 At [29].

12 A reworded version of this section came into force on 18 December 2013 so does not apply to this proceeding: Fair Trading Amendment Act 2013, s 32.

13 *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514 at 525 per Mason CJ, Dawson, Gaudron and McHugh JJ, cited with approval in *Red Eagle*, above n 9, at [29].

14 *Red Eagle*, above n 9, at [29]–[30].

…

> Another operating cause of loss or damage may perhaps have been the claimant's own conduct in failing to take reasonable care to look after his or her own interests.

Did Mr Dallas breach section 9?

Was the statement as to kick outs misleading?

[21] We observe that the Judge did not address herself to the first question in connection with the kick outs: whether a reasonable person in the Council's situation would likely have been misled or deceived by the statement. She instead approached the issue by considering whether the Council's reliance on the statement was reasonable, a different issue to that arising under s 9. Nevertheless the Judge did say that she considered that the statement was ambiguous and lacked detail. We do not agree with that assessment.

[22] The statement made by Mr Dallas as to the kick outs was clear and unambiguous. The Council said that one of the matters it needed to be satisfied of before issuing the CCC was the installation of the kick outs. When Mr Dallas' letter of 21 February 2005 is read together with the letter to which he responds, the Council letter of 28 September 2004, the second paragraph can only sensibly be read as a statement that the requested kick outs at the end of the apron flashings had been completed by KRH Plumbers. We consider that the statement "[c]ompleted by KRH Plumber" was sufficiently detailed to be a statement that a reasonable council could rely on. It was a misstatement because the kick outs had not been completed.

[23] To resist this conclusion, counsel for Mr Dallas relies upon evidence of his experts at trial which he says supports the Judge's finding that the response could not reasonably have been relied upon because it was ambiguous and lacked detail. He highlights the evidence of Mr Tidd, a building professional with approximately 40 years' experience in residential and commercial building. In particular he notes the following passage of cross-examination:

> Q: Number 2 completed by KRH plumber, accept that's fair, plain as night and day?

A: That's what's written there yes.

Q: Ask a question, get an answer.

A: Doesn't satisfy the question.

Q: How?

A: It doesn't say that it complied – it just says that a plumber fitted it. It doesn't even say it was done correctly.

Q: Well now hang on, if I understood the question, it was put in kick outs. If I understand the answer, if my eyes aren't deceiving me, it says, "completed by our plumber".

A: Mmm.

Q: Is that not the case, clear as night and day?

A: It doesn't demonstrate compliance. On its own that is not satisfactory to demonstrate compliance with that question. If they said that, then that – which is fine, to say it's been done by our plumber but it should have gone on to say that it complied with whatever method but alternatively there should have been a further site inspection that checked that it was actually done correctly.

Q: Now if they'd done it, done the work that the Council had requested, would you accept that it would have complied with the building code?

A: Not without checking it.

[24] In this evidence, Mr Tidd divorces the statement in question from its context. The statement "[c]ompleted by KRH Plumber" was made in response to the Council's concerns of whether it could be "satisfied that the building will meet the requirements of the Building Code". It would make no sense for Mr Dallas' response to draw a distinction between completion and compliance in that context. We consider that Mr Tidd's evidence in this regard was argumentative and showed an unwillingness to acknowledge the plain meaning of what Mr Dallas said. It also seems to us that this argument confuses the issue of whether the statement is misleading, the s 9 question, with the issues of causation that arise under s 43.

The respondent's further arguments in support of Mallon J's decision

[25] Mr Dallas argues that the statement could not have misled a reasonable council because councils were precluded from relying upon such statements. He

does so on two alternative grounds. The first we understand to be that the statement was not misleading because a reasonable council would never place any reliance upon an assurance from the builder, because it would always check for itself. The evidence does not support such an argument. Expert witnesses for Mr Dallas were prepared to concede that the Council could place some reliance upon the documentation, although they qualified that evidence to the extent that they said that the Council should have pursued further inquiries given the lack of detail contained in the letter.

[26] Prior to the hearing before this Court, Mr Dallas gave notice as required that he wished to support Mallon J's judgment on another ground; namely, that the statement could not be relied upon by the Council because of s 43(8) of the Building Act. That section provided that a council may accept a producer statement as establishing compliance with all or any of the provisions of the Building Code. A producer statement is defined as:

> any statement supplied by or on behalf of an applicant for a building consent or by or on behalf of a person who has been granted a building consent that certain work will be or has been carried out in accordance with certain technical specifications.

[27] Mr Dallas argues that this statutory permission to rely on producer statements should be construed as implying a corresponding prohibition upon the Council relying on written statements other than producer statements. None of the Council's witnesses maintained that the statement in issue was a producer statement. It was common ground it was not.

[28] The Council objected to this ground being advanced by Mr Dallas on the basis that it was neither pleaded nor argued in the lower Court.[15] Counsel for Mr Dallas said that the argument was raised both in opening submissions and in closing submissions in the High Court. We are satisfied that it was and have accordingly considered the argument. We have concluded it has no merit. As the Council submits, there is nothing in the language of s 43(8) which suggests that these

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[15] Rule 33 of the Court of Appeal (Civil) Rules 2005 does not permit parties to raise a new ground which was not pleaded or argued in the lower Court on appeal. See *Attorney-General v Dotcom* [2013] NZCA 488 at [6] and [11]–[12].

are words of restriction, such that the Council may only accept producer statements and not other documentation.

[29] Such a reading would also be inconsistent with pt 4 of the Building Act which deals with the functions, powers and duties of territorial authorities. Section 43(3)(a) provides that:

> … the territorial authority shall issue to the applicant in the prescribed form … a code compliance certificate, if it is satisfied on reasonable grounds that … the building work to which the certificate relates complies with the building code.

Under s 26, councils have a duty to:

> … gather such information, and undertake or commission such research, as is necessary to carry out effectively its functions under this Act.

"Information" is not defined in the Act.

[30] Again there are no words of restriction in these provisions. It would be most unlikely that Parliament intended to constrain the information councils can rely upon in performance of their functions, and in particular their s 43(3) function, in the indirect manner that is argued for by Mr Dallas.

[31] Mr Dallas also seeks to support the Judge's findings on a further alternative ground to those expressed in the judgment itself. He argues that it was expressly or impliedly made plain to the Council that he was merely acting as a conduit in passing on information received from Kingdom (and in particular Mr Ledbury), of which he had no firsthand knowledge. Mr Dallas relies upon the following in support of this argument:

(a) He signed off all letters as managing director of Kingdom, and all letters were on Kingdom's letterhead.

(b) Mr Cody, for the Council, confirmed the majority of letters were sent to it by Kingdom.

(c) The statement said "[c]ompleted by KRH Plumber".

(d) Mr Dallas' evidence was that all the information passed on was provided by Mr Ledbury. The Council was or ought to have been aware of this, given its knowledge of Kingdom's operations from other sites, which was as stated by Mr Saul, a witness for Mr Dallas:

> While I was at [the Council,] Kingdom was well known to the Building Compliance team as a company which administered building contracts on a labour only basis. It used contractors to build and did not employ its own builders to do the building work. [Council] inspectors knew who was working on building sites. If Mr Dallas was not building houses on Kingdom sites, [the Council] would have been aware of that.

(e) Mr Dallas in the first paragraph of the 21 February letter stated "we have now obtained the relevant information needed".

(f) Finally, the building officer in charge, Mr Geraghty, noted in a site report dated 24 September 2004, that Messrs Dallas and Ledbury were present as "Kingdom residential representatives".

[32] The Supreme Court considered the "mere conduit" defence in *Red Eagle* and said:[16]

> In order to be seen to be a mere conduit, the conveyor of misleading or deceptive information must have made it plain to the recipient that he or she is merely passing on information received from another, without giving it his or her own imprimatur – that is making it appear to be information of which the conveyor has firsthand knowledge.

[33] We do not consider that this defence is available to Mr Dallas. He did not make plain he was merely passing on information. Even if Kingdom's operating method was to employ others to do the construction work, the detailed response to the items begins with the sentence, "I have worked through your letter and have numbered your points along with the information needed as follows". Mr Dallas thereby presents himself as having worked through the issues and as having personal involvement in or knowledge of the solutions to the Council's requirements. Further, the 17 February letter (attached to the letter of 21 February) included this statement from Mr Dallas:

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16 *Red Eagle*, above n 9, at [38].

> This letter is to confirm that as a qualified Registered Master Builder I am commenting on the impact of a leaking window at the above address.

Although that letter addressed a different issue, it would have served to strengthen the impression created by the principal letter that Mr Dallas, a skilled professional, had taken charge of the issues and had sorted them out.

[34] Finally we have considered Mr Dallas' argument that the statement was not misleading because it was implicit in the letter that no reliance should be placed upon any representations contained in it, because the Council was advised it should do its own inspections. Mr Dallas points to the statement in the second paragraph "I would like to arrange a time on site … to meet with you to go over this matter." However, that invitation is not expressed as a disclaimer of the contents of the letter.

[35] We are satisfied that a reasonable council, having asked for the kick outs to be installed, and having received written confirmation from a registered master builder that a plumber had installed them, would have been misled into believing they had been installed.

The Building Act argument

[36] The Council also appeals on the ground that the Judge erred in finding that Mr Dallas' statement in the letter of 21 February "we have complied with the [B]uilding [A]ct" only related to the parapets of the building. The Council said this statement responded to the Council's concluding remark in its September letter:

> The Council needs to be satisfied on reasonable grounds that all building work complies with the requirements of the Building Act 1991 and the Building Code 1992 at the time when the Code Compliance Certificate is requested.

The Council argues that the natural and ordinary meaning of Mr Dallas' statement "we have complied with the [B]uilding [A]ct", read in context, was that the house complied with the Act and Code and was weathertight.

[37] The Judge observed that the liquid moisture barrier referred to in the paragraph related to the parapets (both roof and deck), and the response therefore

related to item 3 of the Council's letter. She said "[it] was not a general assurance of weathertightness".[17] We agree that if this statement is read in context, a reasonable council would have understood the statement to relate to the parapets so that there was no misstatement. The liquid moisture barrier is referred to in this context in Kingdom's later letter of 28 February 2005. This conclusion is also supported by the evidence of Mr Cody, a Council employee who was involved in the issue of the CCC. When asked about that paragraph of the 21 February letter he said:

> … Now that, I know it gets a little bit confusing, but effectively what we were discussing there was the fact that, ah, we were talking about flat tops to parapets. Now the manufacturers specification talks about having a 10 degree slope to shed water. Now in this particular instance our building officers flagged that it was flat, which was contrary to the manufacturers specs, so therefore we asked for clarification as to how it was actually meeting building code requirements which was to prevent the ingress of moisture. In this case they put a waterproof membrane over the top.

Relief under section 43

[38] A breach of s 9 is therefore established in connection with the statement as to the kick outs. Consideration then turns to the assessment of relief under s 43. The first issue under this head of inquiry is whether the Council relied on the statement; the statement cannot be said to have caused loss if the Council did not rely upon it.

Did the Council rely upon the statement?

[39] The Judge found that Mr Dallas' conduct was not a material cause of the Council's loss because:[18]

> [The Council] accepted liability in respect of the kick outs. Mr Dallas did not assert that he had installed the kick outs. He said that the work was done by Kingdom's plumber. He anticipated [the Council] would inspect the work. [The Council] did so.

[40] She observed that Mr Dallas, as a registered master builder, would have known that the presence or absence of kick outs would be visible on a site inspection. A visit did take place. The CCC was issued because, quoting from a letter issued by Council following that inspection, "[f]ollowing a recent site visit it

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17 High Court judgment, above n 2, at [63].
18 At [103].

appears that the remedial work and documentation identified in Council's letter to Mr Craig dated 28 September 2004 have been completed". The Judge concluded:[19]

> It therefore appears that either the inspector did not inspect for the presence of kick outs or he was satisfied that sealing addressed the issue.

[41] The Judge then moved to a finding that in the circumstances it was not reasonable for the Council to rely on the item 2 response.[20] She therefore did not squarely address or make a finding as to whether the Council relied upon the statement. The Judge seems rather to have contemplated two scenarios: the first, that the Council did not inspect, and then second, that it did, but found and was satisfied with sealant rather than kick outs.

[42] On appeal Mr Dallas argues that the Council did not discharge the onus upon it to prove reliance, and that the evidence supports the inference that the Council did not rely upon the statements in the 21 February letter. He says that Mr Cody's evidence of reliance was general in nature. The officer who issued the CCC, Mr Geraghty, did not give evidence, and Mr Cody admitted on cross-examination that he could not recall what happened at the site meeting.

[43] Mr Dallas also points to the evidence that if something was capable of inspection and had been identified as a problem, then a council would, as a matter of established practice, inspect it as part of the final inspection. Moreover, in the final site inspection report, Mr Geraghty made no reference to relying upon Mr Dallas' letter, referring only to the site inspection.

[44] Mr Cody's evidence was that he had general oversight of the process leading up to the issue of a final CCC for the subject dwelling. He was the person ultimately responsible for the decision whether it was appropriate to issue the final CCC. He was therefore able to give evidence of the circumstances leading to the issue of the CCC and what the Council relied upon in its decision to issue it. He gave unchallenged evidence that he had relied on Mr Dallas' assurances:

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19 At [72].
20 At [73].

> At the time taking into account Mr Dallas's standing as a registered Master Builder and director of one of the larger residential builders in Wellington, I relied on his assurances during site meetings and in his correspondence including his letter of 21 February 2005 … [i]n deciding whether the building work was code compliant and whether a final CCC should have been issued.
>
> I considered it was "reasonable" for me to be able to rely on his assurances that the matters under review, namely the items referred to in the council's letter of 28 September 2004 … including the cause and remediation of the leaking windows and the waterproofing of the parapets, had been addressed.

[45] This is general evidence in the sense that he does not refer specifically to the kick outs, but as counsel for Mr Dallas accepts, Mr Cody was not challenged on that aspect of his evidence. Reviewing the evidence it seems that the defence case was conducted on the basis that it was assumed the Council had relied on the statement, but challenged the reasonableness of that reliance. This may explain the failure to challenge this aspect of the evidence. At one point, during cross-examination of Mr Cody, counsel for Mr Dallas summarises the propositions he has been putting as follows:

> … Now I'll move on to a new topic. So even if Mr Dallas had personally made untrue statements, which he denies, the experts Mr Saul and Mr Tidd say [the Council], should never have accepted his statements as satisfactorily proving the building code was complied with …

[46] Mr Dallas argues we should infer from the evidence that the Council did not rely on Mr Dallas' statement but rather on its own inspection. We do not consider that inference is available when Mr Cody was not challenged on his evidence. On cross-examination, Mr Cody was prepared to accept that the Council should have checked, but it was not suggested and he did not accept that the Council had checked. He did say that he knew that sealant was used, but says that he knew that "[a]fter looking at documents". We understand his reference to be to the documents he has seen as a consequence of these proceedings.

[47] We also consider that the circumstantial evidence tends to support the inference that the Council did not inspect to check the kick outs. If the Council had, it would have discovered a state of affairs contrary to that which had been represented to it. That would surely have been remarked upon in later correspondence.

[48] If the Council did not inspect for the presence of kick outs, that left it with only Mr Dallas' representation to enable it to check off that item as complete. Mr Cody's evidence is that he relied upon Mr Dallas' assurance in issuing the final CCC. This evidence supports the inference that the Council did rely upon Mr Dallas' statement as to the kick outs in satisfying itself that the checklist it had issued had been completed, and in issuing the CCC. We are satisfied that the Council did discharge the onus upon it to prove reliance upon the statement.

Was the misrepresentation causative of the loss?

[49] The next issue that arises is whether Mr Dallas' misstatement as to the completion of the kick outs was the effective cause of the loss, or rather simply immaterial to that loss.[21] The Council has conceded that it was itself at fault. However, the fact that it may have contributed through its own carelessness to its loss does not disqualify it from bringing a claim.[22] As Gleeson CJ remarked in *Henville v Walker*:[23]

> Negligence on the part of a victim of a contravention is not a bar to an action … unless the conduct of the victim is such as to destroy the causal connection between contravention and loss or damage.

[50] However, in terms of ss 43(1) and (2), the Court has a discretion as to whether or not to grant relief, and if so what orders are appropriate in respect of a proven breach of s 9. The discretion includes ordering payment of only part of the loss or damage or, in the case of extremely reckless behaviour by the claimant, even that no order for payment should be made. The exercise of the power to make an order for payment under s 43 is a matter of "doing justice to the parties in the circumstances of the particular case and in terms of the policy of the Act".[24]

[51] The Council accepts that it should have checked the kick outs for itself, that it was careless in not doing so, and that accordingly it should bear part of the loss. However it says that it was reasonable for the Council to rely upon Mr Dallas' letter

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21 *Red Eagle*, above n 9, at [29]–[30].
22 *Red Eagle*, above n 9, at [30].
23 *Henville v Walker* [2001] HCA 52, (2001) 206 CLR 459 at 468.
24 *Goldsbro v Walker* [1993] 1 NZLR 394 (CA) at 404 per Richardson J.

and seeks to be awarded 50 per cent of its loss, namely $273,000. It says reliance was reasonable because:

(a) councils exercise regulatory oversight, not a clerk of works-type role;

(b) the Council performed 18 individual building inspections for this dwelling, and was entitled to make its assessment as to code compliance by reference to those inspections *and* Mr Dallas' statements;

(c) there was evidence of reliance by the Council and expert evidence that it was reasonable to place some reliance on Mr Dallas' statements; and

(d) the fact the Council admitted negligence when inspecting is not a bar to the Fair Trading Act claim.

[52] Mr Dallas' position is that the Council had a clear duty to inspect the works it had required be done before it would issue a CCC. It was its breach of duty that was the only operative cause of that loss. He says that Mr Cody accepted the Council should have checked the kick outs, and that this can be seen as an acknowledgment that the reliance was not reasonable.

[53] Experts for Mr Dallas drew a distinction between Mr Dallas' representation that the kick outs had been installed and a representation that there was compliance with the Building Code. Referring to the passage in Mr Tidd's evidence identified above, it is said that the representation was too vague to constitute a representation that the work complied with the Building Code or that it was done correctly. Mr Tidd made it clear that the Council should have gone back and asked for clarification as the comments on their own were worthless – they should not have been accepted without further investigation. Mr Saul, Mr Dallas' other expert witness, said that in light of the knowledge about leaky buildings that existed by 2004/2005 and the Council's identification that kick outs were required, it ought to have checked the kick outs as part of its final inspection.

[54] As the Council concedes, the misstatement was not the only cause of the Council's loss. It failed to follow its usual process, a process it concedes was required by the duty it owed the owner plaintiffs, of checking that each item had been addressed as Mr Dallas represented. As it concedes, the locations where the kick outs were to be installed could easily have been inspected.

[55] The Council's evidence was that it took comfort from Mr Dallas that the remedial works had been done. There were multiple inspections of the site, and many issues identified and addressed, but when it came to the kick outs, the Council relied upon Mr Dallas' assurances. Mr Dallas was himself careless in stating as a fact that which he had not himself checked and indeed he did not know. He represented himself as taking charge of the issue, and as being well-qualified for that purpose. He plainly intended the Council to rely upon the contents of the letter and its enclosures. If not, why write it? Even if he thought the Council would check for itself, he did not attempt to warn the Council it would need to do its own checks, or that none or only some of the material should be relied upon. By making a misstatement, he created at least part of the circumstances which led to the Council's breach of its duty, the other circumstance being the Council's own lack of care. If Mr Dallas had not represented that the remedial work had been done, then the Council would have checked for itself and found it had not been.

[56] We therefore consider that doing justice between the parties requires some contribution from Mr Dallas to the loss suffered by the Council. Counsel for the Council asks us to make that apportionment, which as mentioned the Council puts at 50 per cent. Counsel for Mr Dallas asks that the issue be remitted back to the trial Judge. Having read the transcript of the hearing, our preliminary view is that we are in as good a position as the Judge to undertake the apportionment.

[57] We are provisionally of the view that if the apportionment were determined solely on the basis of the respective contributions to the kick out problem, then 50/50 would seem appropriate. However there is a further issue, namely whether the apportionment should be determined on that basis, or whether the other defects for which Mr Dallas was not responsible should also be taken into account having regard to the need under s 43 of the Act to do justice to the parties in the

circumstances of this particular case and in terms of the policy of the Act. Although counsel were in agreement that the lack of kick outs was sufficient on its own to require a total re-clad, they were also in agreement that there were other defects which allowed water to enter the structure of the house.

[58] This was not an issue that was canvassed at the hearing and therefore submissions on that issue are sought.

Outcome

[59] The appeal is allowed to the extent that we are satisfied that Mr Dallas' conduct did breach s 9 of the Fair Trading Act and that the Judge erred in finding that it did not. Counsel are to file further submissions in respect of the issue identified at [57]–[58] above as follows:

(a) The appellant, by 5.00 pm on 16 January 2015.

(b) The respondent, by 5.00 pm on 2 February 2015.

Solicitors:
Heaney & Partners, Auckland for Appellant
MacAlister Mazengarb, Wellington for Respondent