IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-2129
[2017] NZHC 949

BETWEEN	ANTHONY CHARLES BENJAMIN AND KATHERINE JANE JOHNSON Plaintiffs
AND	NIGEL ROBERT ARMSTRONG First Defendant
	STEPHEN WOOLER Second Defendant
	PETER ALLAN DEANE Third Defendant
	CONTINUED OVERLEAF

Hearing:	9 May 2017
Appearances:	A Ho and K R Narayaran for sixth defendant M Lawes for plaintiff/respondent
Judgment:	12 May 2017

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on
***12.05.17 at 3.30 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

AND

DEANE CONSULTANCY LIMITED
Fourth Defendant

AUCKLAND COUNCIL
Fifth Defendant

NEW ZEALAND CERTIFIED BUILDERS ASSOCIATION INCORPORATED
Sixth Defendant

CBL INSURANCE LIMITED
Seventh Defendant

Background

[1] In March 2014 the plaintiffs entered into an agreement with a company called Rok Build Limited to construct a dwelling at 1473 Whangaporaoa Road, Army Bay. Unfortunately Rok Build Limited ("RBL") was subsequently placed in liquidation. The plaintiffs allege that the construction of their house property was carried out in a defective and negligent way.

[2] They then issued proceedings in 2016. One of the parties they joined to the proceeding was the sixth defendant, New Zealand Certified Builders Association Incorporated ("New Zealand Certified").

[3] In their statement of claim the plaintiffs say the following:

> 13. As [the] house was to be their "dream house", their retirement home and a very significant financial commitment, Mr and Mrs Johnson wished to ensure that they would use a reputable builder who would be unlikely to liquidate the building company used following construction of their home. The Mr and Mrs Johnson (sic) therefore did considerable research into builders. The research eventually brought them to the website (the "website") of the sixth defendant, [certified builders].
>
> ...
>
> 15.1 The website which held the address of http://www.certified.co.nz, stated, on its 'homepage':
>
> 16.1 "One of the best guarantees in the business" and
>
> 16.2 "One of the most comprehensive independent guarantees that there is".
>
> …
>
> 16. On the basis of the information provided on the website Mr and Mrs Johnson specifically made the decision to use Rok Build Limited because they were local builders who were Certified Builders / members of the, then, Certified Builders Association, and because of the guarantees provided by the Certified Builders Association.

[4] They allege that the form of the contract with RBL was one provided by the sixth defendant. They plead that:

> 18. The Contract was entered into using the "full build building contract" form provided by [the sixth defendant] with the reference number 0308/03, and was completed by the parties' hand writing the relevant contact details into the preprinted form
>
> ….
>
> 19.3 Clause "13.7" The Builder shall apply for a Homefirst Guarantee prior to commencement of the Work"

[5] As it turns out, no guarantee ever came into existence in regard to the construction of the house in this case. The plaintiffs claim that they were misled about the existence of a Homefirst Guarantee. They seek damages from the sixth defendant.

[6] Some additional background is required in order to understand the case that the plaintiffs bring.

[7] As the name of the sixth defendant suggests, it is an incorporated Association representing the interests of Certified Builders. In addition to providing a template building contract for its members to use, the sixth defendant also arranged with an insurer, Builtin New Zealand Ltd to make available a building guarantee which was underwritten by a third party. The circumstances in which homeowners could acquire a guarantee from Builtin New Zealand Limited ("Builtin") will be the subject of further discussion in this judgment. A key point to understand, though, is that the sixth defendant did not provide the guarantee itself. It gave information on its website concerning the availability of the "Homefirst Guarantee" as it was called. Reference to the Homefirst Guarantee was also made in the standard form contract which the sixth defendant made available to its members to use as the basis for individual building contracts.

[8] In their statement of claim the plaintiffs' claim that the sixth defendant is liable to them for breaches of ss 9 and or 13 of the Fair Trading Act 1986 [FTA] and negligent statement. The essence of the plaintiffs' claim is that they were led to believe that a Homefirst Guarantee would be available in every case where a member of the sixth defendant was the builder.

[9] As Mr Ho, counsel for the sixth defendants put it:

> 5. Both causes of action under the FTA and negligent misstatement overlap in that they rely on the same allegation that Certified Builders has misled or deceived the Johnsons through alleged statements made on its website and the full building contract in respect of the automatic existence of a Homefirst Guarantee in the event that a member of Certified Builders was engaged (**the Alleged Representation**).

[10] The sixth defendant now applies for summary judgment.

Summary judgment authorities

[11] I accept that the following statement in the submissions that Mr Lawes made of the summary judgment principles applicable where a defendant applies for summary judgment are correct:

> 15.1 The defendant has the onus of proving, on the balance of probabilities that the plaintiff cannot succeed. Usually summary judgement for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiffs claim.
>
> 15.2 The Court must be satisfied that none of the claims can succeed: it is not enough that they are shown to have weaknesses.
>
> 15.3 Summary judgement will only be suitable where all material facts are not in dispute and can be put before the Court efficiently in affidavit form.
>
> 15.4 The procedure may be inappropriate that the case is likely to turn on a judgement which can only be reached properly after hearing all of the evidence at trial.
>
> 15.5 Developing points of law may require the added context and perspective provided by a full trial.
>
> 11. The learned authors of Sims' Court Practice, at paragraph 12.2.11 also note that:
>
> "The statements of principle in the Court of Appeal's judgments in *Westpac v Kembla and Barnard v Space 2000* [(2001) 15 PRNZ 338] were approved by the Privy Council in *Jones v Attorney-General* [2004] 1 NZLR 433 [and that t]he test for summary judgment against a plaintiff is an exacting one since it is a serious thing to stop

a plaintiff bringing his or her claim to trial unless it is clearly hopeless: *Jones v Attorney-General* (below)."

12. The learned authors also note that: While the plaintiff does not have to put up any evidence at all, if the defendant supplies evidence which would satisfy the court that the claim cannot succeed, the plaintiff will usually have to respond with credible evidence: *Attorney-General v Jones* (2001) 15 PRNZ 347; *Sadler v Van Nes* HC Auckland CIV 2003-404-3236, February 2004 (BC200460052)."

13. Finally the learned authors at 12.2.1 note: "Rule 12.2(2) permits a defendant who has a clear answer to the plaintiff to put up the evidence (if uncontroverted). The difference between this and a strike-out application under r 15.1 is that a strike-out application is usually dealt with on the pleadings alone, whereas summary judgment requires evidence: *Westpac Banking Corporation v M M Kembla NZ Ltd* [2001] 2 NZLR 298 . Rule 15.1 also permits the striking out of one or more of several causes of action, whereas summary judgment will only be ordered against the plaintiff if all of the causes of action are unsustainable: *Crater Lake Holdings Ltd v MPL George Ltd HC Wellington* CP 128/00, 21 December 2000."

The FTA claim

[12] The claim against the sixth defendant to a large extent depends upon what was stated on its website about the availability of Homefirst Guarantees from Builtin.

[13] The claim that the plaintiffs make was summarised in a letter that their lawyer wrote on their behalf to the sixth defendant:

> At the time of considering builders for the home, and prior to entering into any contract with builders, Mr and Mrs Johnson very carefully investigated potential builders. They were aware of the possibility of defective work and the ability of building companies to liquidate themselves to avoid potential liability. They therefore looked very carefully for builders which were linked to larger well-respected organisation, including Certified Builders and the Certified Builders Association. They looked very carefully at, in particular, your website which stated (and states now) on its 'home page': "one of the best guarantees that there is". The website then states, under the heading of, "One of the Best Guarantees in the Business": "Completion of your home", "Fixes defects up to 10 years", "Includes alternative accommodation" and "Independently backed". Nowhere on this page is it made clear that the guarantee is not provided automatically if a Certified Builder is used and that this has to be paid for separately. If you 'click', and it is not made clear that you can 'click' on this, on the heading "One of the best guarantees in the business" you are taken to a page where there is a detailed discussion about the benefits of taking out a Certified Build

> Guarantee, but again there is no indication that this is something that needs to be applied for and paid for separately. At the most, under the heading "How do I obtain a Homefirst Builders Guarantee" it states: "Your Certified Builder will help you lodge an application for a guarantee with Builtin New Zealand Ltd at the time the building contract is signed, and before construction begins. Assuming Builtin approves the application, they will send the owner a Guarantee Certificate and written confirmation that the guarantee is accepted."
>
> On the basis of information provided on your website, and as above, Mr and Mrs Johnson specifically made the decision to use Rok Builders Ltd because they were Certified Builders/members of the Certified Builders Association and because of the guarantees provided by the Certified Builders Association.
>
> Mr and Mrs Johnson, when they discovered the defects on their home, made enquiries about claiming under the Guarantee only to discover that the builder had not lodged an application and that there was no Guarantee in place. Mr and Mrs Johnson did not understand that (1) they were to make an application with the assistance of the builder (2) that they were to separately pay for this Guarantee and (3) that they were to 'look out for/be provided with confirmation that the Guarantee was in place.

[14] The plaintiffs' accept that there was no express representation made to them in which the sixth defendant stated that as customers of a builder who was a member of the sixth defendant the plaintiffs would automatically receive a Homefirst Guarantee.

[15] In summary the plaintiffs stated:

> 30. …
>
> > While it may be correct that "the website does not make any [explicit] representation that the Homefirst Guarantee is automatically provided upon engaging a member of Certified Builders' our position is that the overall impression that a Certified Builders (sic) gives, including on their website, is that one is automatically provided. Our position is that the "small print" indicates that an owner has to separately apply for a Homefirst Build Guarantee and pay for this separately is not clear in the context of the rest of the representations and documentation including without, without limitation, the Certified Builders, contract as referred to above.

The position of the sixth defendant

[16] The sixth defendant principally relied upon the affidavit evidence of Mr McClintock, its operations manager.

[17] Mr McClintock referred to the letter that Mr Lawes wrote on 1 July 2015 and an excerpt from it which is reproduced above at paragraph [13].

[18] Mr McClintock noted that on the Certified Builders website (as it then was) the Homefirst Guarantee was promoted as an "Independent" Guarantee. He said that the Homefirst Guarantee was described on the website as "Independently backed" and "One of the most comprehensive independent guarantees there is". Mr McClintock also noted that the website set out the obligations of the owner and builder under the guarantee. He noted that the following statement appeared on the website:

> There are a number of obligations or conditions under the guarantee including payment of the guarantee fee, frank and honest disclosure … .

[19] He noted that the website described Builtin as a "specialist provider of guarantees and insurance to the construction sector in New Zealand". He stated that the website, in essence, stated that the Homefirst Guarantee is:

> 28.1 Underwritten by CBL Insurance Limited and administered by Builtin New Zealand Limited, not Certified Builders;
>
> 28.2 Subject to payment of the necessary fees; and
>
> 28.3 Subject to preliminary and continuing disclosure obligations.

[20] It was Mr McClintock's contention that the emphasis on "independent" should have conveyed to a reasonable reader of the website that the Homefirst Guarantee is not automatically provided upon engaging a member of Certified Builders, but rather it is a supplementary guarantee which can be purchased. He said there was no statement on the website that a Homefirst Guarantee is automatically provided upon engaging a member of the Certified Builders Association. Mr McClintock summarised the pages on the website of the sixth defendant as being to the following effect:

> 20. The representations made in respect of the Homefirst Guarantee on the website are:
>
> Members of the Certified Builders Association of New Zealand must make their customers aware that they can apply for a ten-year independently insured guarantee when building a new home. For

> alterations and additions the builder can also apply for a guarantee, at the customer's request.
>
> ...
>
> How do I obtain a Homefirst Builders Guarantee?
>
> Your Certified Builder will help you lodge an application for a guarantee with Builtin New Zealand Ltd at the time the building contract is signed, and before construction begins. Assuming Builtin approves the application, they will send the owner a Guarantee Certificate and written confirmation that the guarantee is accepted.
>
> ...
>
> What are the obligations of the owner and the builder under the guarantee?
>
> There are a number of obligations or conditions under the guarantee including payment of the guarantee fee, frank and honest disclosure, not to make excessive advance payments, to notify Builtin of variations, prompt notification of claims, preservation of the owner's rights against the builder, compliance with the building contract and the building code, acknowledgement of practical completion, using only approved builders, maintenance of the dwelling or works, and mitigation of any damage or loss, as approved by Builtin New Zealand Limited. Full details and obligations of the builder and owner are set out in written guarantee document.
>
> Who is Builtin New Zealand Ltd?
>
> Builtin is specialist provider of guarantees and insurance to the construction sector in New Zealand. They provide the support and administrative services for the Homefirst Builders Guarantee to Certified Builders and their customers. Their staff have over 40 years experience in the New Zealand insurance industry. The guarantee itself is underwritten by CBL Insurance Ltd, who are New Zealand's largest and longest-established specialist bonding, financial risk and surety company. They have 40 years experience and are licenced and regulated by the Reserve Bank of NZ. CBL's guarantee protect [sic] more than one million homes worldwide

[21] The various points that were made by the plaintiffs in response to the evidence of Mr McClintock were as follows.

[22] The plaintiffs conceded that the various statements that Mr McClintock's said appeared on the website were in fact present there at the relevant time. They did however claim that the statement about the requirement for the owner to pay for the insurance only appeared "two and three quarters down the page" (sic) and "only after one clicks through to this information".

[23] The further point is apparently made for the plaintiffs that while there is a statement to the effect that the guarantee has to be paid for, that it does not go further and say that the owner must apply for and pay for the guarantee. They mention this contention in conjunction with the further point that the website also said that under the section headed "How do I obtain a Homefirst Builders Guarantee?":

> Your Certified Builder will help you lodge an application for a Guarantee with [Builtin] at the time the building contract is signed, and before construction begins. Assuming Builtin approves the application, they will send the owner a guarantee certificate …[1]

[24] The plaintiffs say that the "contract states that the builder, not us, will apply for a guarantee". However Mr McClintock's evidence which they accept as correct on this topic said that the obligation of the builder was stated in the following terms:

> Your Certified Builder will help you lodge an application for a guarantee … .

[25] This is a different meaning from the one which the plaintiffs then go on to state namely that "the builder, not us, will apply for the guarantee". The plaintiffs say "It, was in fact, our understanding that our builder would apply for this".

[26] Of course, any obligations that the builder may have had with regard to this provision of the contract do not affect the sixth defendant.

[27] The further point which the sixth defendant makes is as follows:

> 6. Certified Builders' case for summary judgment is simple in that the evidence which the Johnsons rely on (being the website and the building contract) do not lend any support to their claims.
>
> 7. To the contrary, the representations made in Certified Builder's website clearly state that:
>
> 7.1 The Homefirst Guarantee is supplied by Builtin New Zealand Ltd, not Certified Builders.
>
> 7.2 The provision of the Homefirst Guarantee subject to a number of conditions, including:
>
> 7.2.1 Payment of the necessary fees.
>
> 7.2.2 Preliminary and continuing disclosure obligations.

[1] BD 80.

8. The Johnsons failed to comply with these obligations.

9. It is highlighted that the Johnsons' have not pleaded and are unable to point to any express representation in support of their allegation that they have been misled.

10. At the most, at paragraphs 15.1 and 15.2 of the statement of claim, the Johnsons have pleaded that representations were made as to the quality of the Homefirst Guarantee but they have not pleaded that the Alleged Representation was made to them.

11. This is because the Alleged Representation (or any representation to that effect) was not made to the Johnsons and is a fact that has been admitted by them in their affidavit at paragraph 30.

12. Rather, the Johnsons have now changed their position and are now alleging that the Alleged Representation was made based on an "overall impression" of the website despite being unable to point to any particular statements to substantiate how such an impression arose.

13. In essence, it is clear that there is no misleading or deceptive conduct in the website or full building contract and the Johnson's impression that the Alleged Representation was made was based on their own erroneous assumption for which Certified Builders should not be responsible.

Discussion

[28] In my view the starting point in assessing a Fair Trading Act claim where a representation is relied upon is to focus on the words actually used to interpret those words using the ordinary meaning that a reasonable reader of the words would attribute to them. In coming to a conclusion about that meaning matters such as context and the totality of the statements have to be considered.

[29] The issue that arises is whether the alleged representations here are actionable. Before that point can be reached, the argument must be able to persuade the Court that, in the words of Tipping J in *Marcole Manufacturers Limited v Commerce Commission:*[2]

> The representee may of course of a specific person or group of persons or indeed persons generally such as shoppers who may come into a particular shop. The representor must be communicating a statement of fact to the representee either directly or by clear and necessary implication.

---

2 *Marcole Manufacturers Limited v Commerce Commission* [1991] 2 NZLR 502, at 506.

[30] Adopting such an approach, I will consider the various evidence that has been put forward by the plaintiffs in answer to that of the defendants.

[31] A contention which the plaintiffs put forward in response to the contention that the sixth defendant makes is that in the circumstances the plaintiffs ought to have been told that the Homefirst Guarantee was not provided automatically "when one employed a Certified Builder".

[32] I do not consider that that approach is correct. It is incumbent upon the plaintiffs who assert the representation to provide grounds for believing that a misrepresentation was made. It is not enough for them to say that they can attach such meaning as they choose to the statements that the sixth defendant made and then require the sixth defendant to provide a refutation of the meaning so alleged.

[33] Next there is the assertion that the effect of the statements on the sixth defendant's website was to create the impression by a prominent statement that insurance was automatically available, only to resile from the statement in obscure wording not easily to be found in another part of the document.

[34] It appears that what Mr Lawes was trying to say was that a person looking at the website would have had to click down through the document to find out in its entirety what the conditions were that attached to the grant of the guarantee.

[35] The screenshot of the website which the plaintiffs annexed to their contract is the equivalent in length of a little over two A4 pages. The font is of a reasonable size. The amount of information therefore conveyed in that screenshot is not unusually dense so that an important aspect of the offer might be lost amongst the welter of detail that can occur in statements of the kind where there is excessive "fine print".

[36] The plaintiffs and their counsel have made reference to headline representations being made by the sixth defendant on its website which are then made the subject of limitations or restrictions which only appear in "fine print". The question that arises is whether in regard to this issue the Court is able to say that on

the balance of probabilities the sixth defendant is able to demonstrate that the contention is incorrect.

[37] I conclude that it is able to establish that fact. The formatting of the webpage into two A4 pages approximately does not correspond with those cases where legal limitations on the headlining representation are made in an obscure part of the document where they are embedded in a vast amount of text. All of the conditions which apply to the insurance policy appear reasonably close together on the website pages and there is no difference in font or other manner in which it can be said that having made a headline claim that insurance is available the sixth defendant has given the lie to that claim in detailed legal exceptions which are inconspicuous and difficult to locate. I do not consider that having regard to the size of the document its arrangement and formatting that it is inherently misrepresents the position about the guarantee.

[38] Given that all the information is contained in the equivalent of two A4 pages, it is difficult to see how it could possibly mislead a literate reader of the information who, as the plaintiffs acknowledge they did, has gone to the website to obtain information.

[39] In the two page screenshot the point is made that the Homefirst Guarantee is an "Independently insured guarantee". This makes it clear that it is not being provided by the sixth defendant or the builder. This is reinforced by the fact that the webpage makes reference to the need for an application to be made for "A guarantee with Builtin New Zealand Limited". Further, in the same webpage content it is made clear that an application has to be made to Builtin New Zealand Limited for insurance. That is to say, it is made clear that this is not a matter in which either the sixth defendant or the builder make the decision. It is the insurance company that makes the decision.

[40] The fact that an application has to be made further rules out the possibility that insurance is automatically made available to customers of builders who are members of the sixth defendant association. Further, the same two pages contain the

advice that the home owner will have to pay for the guarantee. That is to say it is not provided gratis.

[41] A reasonable home owner reading these passages from the website would understand that insurance was not automatically going to come into existence and that it could not come into existence until they had made the requested payment for the guarantee.

[42] Assessed against this background, I do not accept some of the evidence which the plaintiffs have put forward. The fact that a reader of the web page content has to scroll down or click to get the full extent of the information may literally be true.

[43] I deal next with the contentions of the plaintiffs that while agreeing that the website said they had to pay for the insurance, it was nonetheless "our understanding that it was included in the contract price, particularly as the builder was to obtain the Homefirst Guarantee". This statement is an assertion of an understanding but it does not explain the foundations upon which the understanding rested. For the purposes of claims under the FTA, any mistaken understanding of the meaning and effect of a document is only relevant if it is caused by some deceptive or misleading conduct on the part of the representor.

[44] The facts in this case have some similarity to the case of *Mills v United Building Society*[3] where the plaintiff purchased a leasehold interest in property at a mortgagee sale on the misunderstanding that it was a "Glasgow" lease when in fact it was a "Friedlander" lease. The Judge said:

> On the totality of the evidence, I am satisfied that no conduct has been established against the defendant which can be described as misleading or deceptive, and in particular silence on its part cannot in the instant cases assist the plaintiffs. The whole unfortunate episode has been brought about by Mr Mills making certain assumptions in relation to a particular lease with which he was not familiar. He made those assumptions after having been supplied with a copy.

---

3 *Mills v United Building Society* [1988] 2 NZLR 392.

[45] This is consistent with the description of the category of cases where claimant has come to erroneous conclusions about a statement which is referred in *Gault on Commerial Law*:[4]

> As was made plain by Dean and Fitzgerald JJ in *Taco Company of Australia Incorporated v Taco Bell Pty Limited*[5]
>
> > ...
> >
> > "Evidence that some person has in fact formed an erroneous conclusion is admissible and may be permissive but is not essential. Such evidence does not itself establish that conduct is misleading or deceptive or likely to mislead or deceive."

[46] To similar effect is the judgment in *Unilever v Cerebos Greggs*[6] where the Court stated:

> Assumptions made by careless purchasers as to the composition of a product when accurate information is available to them does not give rise to liability under the Act unless it is shown that those assumptions are otherwise caused by the product supplier. Not everyone who misconceives the nature of a product has been misled or deceived. Unwarranted assumptions are made every day."

[47] Nor does it advance the case for the plaintiffs to contend as they did in their affidavit:

> While it may be correct that the website does not make any[explicit] representation that the home first guarantee is automatically provided upon engaging a member of Certified Builders' our position is that the overall impression that a Certified Builders gives (sic), including on their website, is that one is automatically provided".

[47] In my assessment, the above deposition does not add anything to the case which the plaintiffs are putting forward. It does not establish that the sixth defendant engaged in actual or potential misleading and deceptive conduct.

[48] A further way in which the plaintiffs assert it was represented to them that there would be a guarantee took the following form. The plaintiffs commenced with the fact that the sixth defendant had created a template-type form of contract for use

---

4 *Gault on Commercial Law*, Gault, Allan & Blacktop, Eds, Wellington, New Zealand,Thompson Reuters NZ, 2016, at Chapter FT9. 19.

5 *Taco Company of Australia Incorporated v Taco Bell Pty Limited* (1982) 42 ALR 177.

6 *Unilever v Cerebos Greggs* (1994) 6 TCLR 187 at page 195

by its members. RBL actually used one of these forms as the basis for the contract which it entered into with the plaintiffs. The contract in its standard form, contained an obligation on the builder to apply for the Homefirst Guarantee, as I have noted above.

[49] To give a more complete picture of the relevant matters that affect the question of whether such a representation was made in this case, it is also necessary to have regard to another provision of the standard form contract which said:

> 6.2 Where the owner has been issued a guarantee, the builder shall ensure that the work is commenced within three months of the building consent being issued.

[50] The plaintiffs' claim that the presence of this clause, coupled with the demonstrated fact that the sixth defendant had established a mechanism whereby home owners could obtain a guarantee, cumulatively amounted to a representation by the sixth defendant that in this particular case the plaintiffs would in fact have the benefit of a guarantee.

[51] In my view the building contract on its own does not convey a representation that there would be a guarantee in every case. That must be the contention of the plaintiffs because they do not of course allege that they specifically communicated with the sixth defendant about their particular case. The contract term, in the building contract, said no more than that a guarantee would be applied for. The fact that the application has to be made is, of course, not logically consistent with a proposition that a guarantee would be applicable in every case. Plainly if no application was made or, if made, was declined, there would be no guarantee. Further, the provisions of clause 6.2 of the standard form contract which I have quoted make it plain that there will be cases where there will be no contract. Otherwise clause 6.2 would have been expressed in terms that made it applicable in every situation.

[52] I do not therefore agree that by providing a standard form contract, for the parties to use for their convenience, the sixth defendant was making the representation which the plaintiffs' claim. The sixth defendant was providing a form of contract which the parties were entitled to use, with or without modification. By

providing the precedent form of contract in the overall context of this case, including the sixth defendant may have been impliedly representing that the template would be a satisfactory written form of contract which would provide agreement on the essential matters that the parties needed to agree on. It could not, however, be reasonably read as stating implicitly that if the parties executed a building contract in the form provided the home owner would have a guarantee.

[53] I do not therefore consider that the contents of the building contract in the overall context of this case support the claimed representations.

Conclusion on FTA claim

[54] My conclusion is that this is a suitable case in which summary judgment on the application of the defendant can be considered. The central facts are not in dispute. The only question is a question of law which is whether the evidence of the plaintiffs proves that there were statements made by the sixth defendant which amounted to misleading and deceptive statements within the meaning of the FTA. The deception which is claimed is that the statements conveyed to the plaintiffs that they would receive a Homefirst Guarantee automatically on signing an agreement with RBL at no cost to themselves. While the plaintiffs may have had an understanding that that was the case, the statements which the sixth defendant made do not represent that that was the case and therefore the statements were not misleading or deceptive.

Negligent misstatement

[55] The plaintiffs also bring a claim against the sixth defendant claiming that it owed a duty of care to the plaintiffs:

> Not to mislead or deceive the users of its website or the users of its "Full build building contract" form as to the provision of, inter alia, as to the automatic insistence under provision to a person, of building guarantees if that person engaged a certified builder.

[56] It is also pleaded that the sixth defendant breached that "duty", that if negligently and without reasonable care misled and deceived the plaintiffs into the

automatic existence and provision to a person of a building guarantees (sic) if that person engages a Certified Builder.

[57] The plaintiffs also plead that because they did not apply for and pay for a building guarantee the plaintiffs have no insurance cover and have suffered loss.

[58] The plaintiffs characterise their claim under this heading as being one for negligent misstatement. Counsel for the defendant, Mr Ho, analyzed the claim on that basis.

[59] Mr Ho referred me to the following passage from the judgment of Lord Oliver in *Caparo Industries Plc v Dickman:*[7]

> 42. The principles in Hedley were summarized by Lord Oliver in *Caparo Industries Plc v Dickman*:
>
> > What can be deduced from the Hedley Byrne case, therefore, is that the necessary relationship between the maker of a statement or giver of advice ("the adviser") and the recipient who acts in reliance upon it ("the advisee") may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry, and (4) it is so acted upon by the advisee to his detriment. That is not, of course, to suggest that these conditions are either conclusive or exclusive, but merely that the actual decision in the case does not warrant any broader propositions.

[60] The contentions of the sixth defendant were that:

a) There is no statement upon which the Johnson's may rely in support of such a cause of action;

b) There is no duty of care;

---

7 *Caparo Industries Plc v Dickman* [1990] UK HL 2.

c) There has been no breach of duty of care.

[61] For essentially the same reasons that led to my conclusions under the FTA claim, I consider that the negligent misstatement claim fails as well. There was no statement made by the sixth defendant which could have reasonably induced a belief that a building guarantee would be automatically provided in this case. I agree with the submission made for the sixth defendant that, as it was the case in regard to the FTA claim, it is not open to the Johnson's to plead that they formed an "overall impression" of the statements on the website interpreted in the light of the building contract. The cause of action in my view cannot succeed.

Conclusion

[62] Successful applications for summary judgment by defendants are not common because of the need for the applicant to show that none of the claims can succeed, the onus of proving which is on the defendant on the balance of probabilities. This case is a suitable one for consideration of such an application because the core evidence is in documentary form. The resolution of the claim depends upon whether consideration of the objective circumstances justifies claims by the plaintiffs that the sixth defendant made misleading statements either expressly or by implication in its documents. These documents were the website pages concerning the availability of a guarantee and in the template building contract which it provided one of its members with, RBL.

[63] The Court is required to come to its own understanding of what misstatements, if any are contained in the various documents. That is both for the purposes of determining whether the statements were deceptive or misleading for the purposes of the FTA and whether misrepresentations were made for the purposes of the negligent misstatement claim.

[64] Because the Court is required to ascertain the objective meaning of the expressions used in the context in which they appeared, there are no disputed questions of fact such as whether the documents gave rise to an "overall

understanding" of the kind which the plaintiffs' claim they had concerning the effect of the documents.

[65] Because the Court is required to objectively assess what the documents meant, it is possible in the context of the summary judgment application to come to firm conclusions. Those conclusions are that the claim under the Fair Trading Act and the claim based upon negligent misstatement cannot succeed. For that reason there will be summary judgment on the application which the sixth defendant has brought.

[66] The parties are to make submissions on the questions of costs and are to file their submissions which are not to exceed five pages on each side within 10 working days.

_____

J.P. Doogue
Associate Judge