IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-1536
[2023] NZHC 1962

BETWEEN	PREMIER PROPERTY DEVELOPMENTS LIMITED Plaintiff/counterclaim defendant
AND	OHL LIMITED Defendant/counterclaim plaintiff
AND	COLLIERS NEW ZEALAND LIMITED (discontinued) Third party

Hearing: 26-30 June 2023

Appearances: S E Wroe and TJM Ashley for plaintiff/counterclaim defendant
J D McBride and E A Gambrill for defendant/counterclaim plaintiff

Date of judgment: 27 July 2023

JUDGMENT OF JAGOSE J

This judgment was delivered by me on 27 July 2023 at 11.00am.
Pursuant to Rule 11.5 of the High Court Rules.

…………………………
Registrar/Deputy Registrar

Counsel/Solicitors:
Sarah Wroe, Barrister, Auckland
Josh McBride, Barrister, Auckland
Elizabeth Gambrill, Barrister, Auckland
Snedden & Associates, Auckland
Burton Partners, Auckland
Meredith Connell, Auckland

[1] By this proceeding, Premier Property Developments Limited (Premier) seeks to recover the $692,000 balance of the $3.500 million purchase price withheld by OHL Limited (OHL) on its October 2018 acquisition of Premier's property at 1/2 Kitchener Street in Auckland's central business district. (The balance is held by a stakeholder, lawyers Alexander Dorrington.)

[2] OHL counterclaims for damages under the Fair Trading Act 1986 and for breach of warranties in respect of Premier's representations as to the property's tenancies and plant. Premier replies any loss OHL suffered was the result of its contributory negligence and failure to mitigate.

Background

[3] The subject building is a 14-storey unit-titled development, comprising Body Corporate 115657. Its basement and ground floor is one of the development's two units, Unit A. The other — Unit B, acquired by OHL in February 2018 — has two carpark and ten other levels for commercial occupation.

[4] OHL's director, Mark Hotchin, also is director of other companies with property interests, including Omara Property Group Limited (Omara). On OHL's acquisition of Unit B, Omara took over as the body corporate's manager. Mr Hotchin was assisted in those endeavours by a Kerry Finnigan (and others).

[5] Unit A is one of two properties owned by Premier, the other being a commercial property in Tauranga. In 2016, Premier was offered $3.750 million for Unit A, conditional on the purchaser's due diligence. Premier unsuccessfully counter-offered at $4.750 million and the potential transaction ended.

[6] In August 2017, Premier appointed Colliers International (Colliers) its general agent to sell Unit A. The Colliers team comprised Adam White, Gawan Bakshi and Simon Felton. Colliers appraised Unit A as having an estimated likely sale value of $4.000–$4.200 million. At about the same time, Colliers presented Premier with an offer of $3.920 million for Unit A, again conditional on the purchaser's due diligence. Premier unsuccessfully counter-offered at $4.350 million and that potential transaction also ended.

[7] Knowing Mr Hotchin then to be in the process of acquiring Unit B, Mr White saw him 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 said in evidence he "routinely receive[s] unsolicited emails like this from agents" but he understood Premier then to be "seeking something like $4 million for Unit A, which I thought was too high".[1] Mr White maintained contact with Mr Finnigan over Mr Hotchin's potential interest in Unit A.

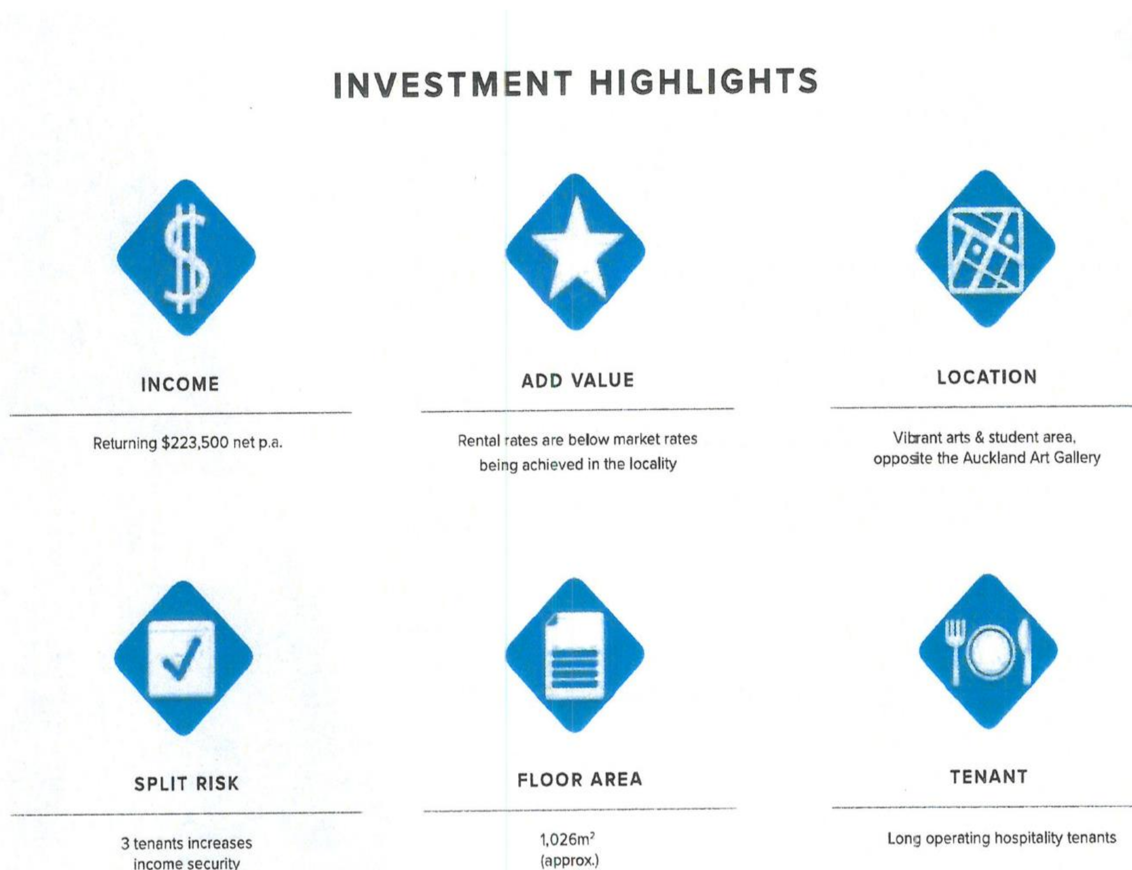
[8] Colliers' off-market attempts to sell Unit A having been unsuccessful, it embarked on a formal marketing campaign in July 2018. The campaign's collateral included an information memorandum to support the property's "sale by way of Deadline Private Treaty closing 4pm, Thursday 16 August 2018" (emphasis omitted). The information memorandum's "Description" of the property was:

> This strata retail holding is currently configured into three retail tenancies. These tenancies all open out onto Khartoum Place, which is the main thoroughfare between [Lorne] Street and Kitchener Street.
>
> Two tenancies are at the courtyard level, one of 568.7m^2 in total area and the second 66.3m^2 in total area.
>
> Between these two tenancies is an entrance to a [subterranean] space of 391m^2. This tenancy is currently occupied by a pool hall.

and specified "Tenancy" as "Fully Leased".

[1] Mr Hotchin gave evidence remotely from the United Kingdom's London. For a period during his cross-examination, his screen was not working, meaning he then was unable to see the courtroom or displayed documents, but that soon was restored without apparent prejudice to his evidence.

[9] The memorandum also illustrated:



and provided:

TENANCY SCHEDULE

TENANT	AREA	NET RENTAL	$/M²	EXPIRY	ROR REMAINING	REVIEW TYPE	REVIEW DATE
Red Pig	568.7m²	$137,100	$241.08	31-05-2021	2 x 3 years	Market on renewal	1 June 2021 & 2024
Buza Limited	391.0m²	$62,400	$159.59	01-11-2020	1 x 3 years	Annual CPI	1 November annually
Ren He	66.3m²	$24,000	$361.99	20-02-2019	1 x 3 years	Market on renewal	20 February 2019
TOTAL	1,026.0m²	$223,500					

The memorandum identified "comprehensive due diligence information", comprising the property's certificate of title, LIM report and leases, was available in an online data room.

[10] The leases specified Unit A's tenants Red Pig and Ren He occupied the ground floor tenancies and the basement tenancy was occupied by Buza Limited (Buza). On 11 July 2014, Ren He took assignment of a six-year lease commencing

23 February 2010 from a prior tenant. Red Pig's six years and five months' lease commenced 1 January 2015. Buza's three-year lease commenced 1 November 2017.

[11] Premier's director, Manilal Hari, gave evidence, prior to Buza's entry into the lease, Nolja Limited (Nolja) — another company operated by Buza's director, Se Woong (Kevin) Lee — "was paying rent informally for a few months to see if Mr Lee could get his business going". Nolja leased the basement for six months from 1 May 2017 at a monthly rent of $5,000 (including outgoings and GST). In September 2017 email correspondence about the lease's renewal from 1 November 2017, Premier explained the monthly rent of $5,200 then would exclude both GST and monthly outgoings estimated at nearly $1000. Mr Lee responded he could not meet those larger sums and would "return the keys" at the end of the lease. When Premier acknowledged Mr Lee's position, Mr Lee enquired instead if Premier "could do $5200 (incl. GST) until March". Premier agreed.

[12] The parties' principals initialled an annotated copy of their September 2017 email correspondence on 8 October 2017, on which date Premier and Buza entered the 1 November 2017 lease. The lease provided monthly rent of $5,200 plus GST was to be paid on that day and the first day of each month thereafter. It also required Buza to pay a percentage of Premier's specified outgoings payable to the Body Corporate and for rates, insurance and utilities. Mr Hari's evidence was "[t]he discounted rent that I allowed to help him establish his business finished in March 2018".

[13] From 1 November 2017 to 31 March 2018, Buza's rent persistently only was 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 paid a total of $18,600. Only $4,200 of the outstanding $7,400, and no further rent, was paid in subsequent months. No outgoings were levied for Buza's payment. None of that was told by Premier to Colliers, who Mr Hari advised in response to "a standard question" about rental arrears the tenants "all paid their rent", which (together with the leases themselves) was the basis for Colliers' marketing material and information memorandum.

[14] On 24 July 2018, Mr White sent the information memorandum to Mr Finnigan together with a link to an electronic dataroom, under cover of an email which repeated

some of the narration to the above 'Investment Highlights' and noted "Attractive rental rates" and "Fully Leased". Mr White added:

> 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.

By "5%s" Mr White meant a calculation of the property's value by derivation from its yields. At Unit A's indicated $223,500 net rental, 5 per cent derives a $4.470 million value; 6 per cent, $3.725 million.

[15] On 26 July 2018, Mr White sent Mr Finnigan a shorter-form flyer promoting the property's sale with reference also to its "long running leases … on rates well [below] recent comparables in the area", in combination with Unit B, "making this a strategic acquisition for [the] future". On 9 August 2018, with reference to comparable rentals, Mr White advised Mr Finnigan the Red Pig tenancy should be recovering rental "much closer to $300 per m2"; the Ren He tenancy "around the $420 - $450 per m2 range"; and Buza's tenancy "should be $200 per m2".

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

> Proactive efforts have been made with other owners in the area. Response has been mixed as owners are concerned about the future outlook of the property market over the next 18–24 months. We are consistently hearing how the slowdown in residential may result in a pullback in commercial rates over the short to medium term.
>
> 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".

[17] As the intended 16 August 2018 sale date approached, Mr White again contacted Mr Finnigan by email 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 considered Unit A’s rentals all were below market rates. On 16 August 2018, Colliers’ Simon Felton sent Mr Finnigan a draft agreement for Unit A’s sale and purchase, attaching the information memorandum’s ‘tenancy schedule’.

[18] Through another company associated with him, Karaka Land Holdings Limited (Karaka), Mr Hotchin then offered unconditionally to buy Unit A for $3.900 million with contemporaneous sale of property at Karaka to Premier for $900,000. Mr White responded to Mr Finnigan that same day “[Mr Hari] won’t even entertain that idea”, and Mr Hari later responded by striking out the contemporaneous sale and counteroffering at $3.800 million. On 19–20 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 $3.900 million and observing “the whole building together … becomes a 5.5%’er … and … puts it close to $30m in value”.

[19] By email of 28 August 2018, Mr White told Mr Finnigan Colliers had “pushed hard to have the trade deal signed” but repeated “it is apparent [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’ is to an anticipated report by Seagar & Partners (Auckland) Limited. On 16 August 2018, Mr Finnigan had instructed Seagars to update its valuation of Unit B, and “also 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”. Seagars’ Reid Quinlan inspected “the property” on 6 September 2018.

[20] A draft report dated 9 September 2018 on Seagars’ files valued Unit A at $3.190 million, Unit B at $22.340 million and the combined property at

$26.650 million (meaning a $1.120 million increase in combined value). Seagars' draft valuation recorded "Unit A is 100% leased to three retail lessees and is returning a new contract rental of $223,500 pa 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 $13,250 "interim invoice" for the report to Omara.

[21] After Colliers' formal sales campaign closed, Mr White continued to push Mr Finnigan for an unconditional offer. On 17 September 2018, Colliers received an offer of $3.550 million for Unit A in the name of Yiyang Liu, conditional on her due diligence within 20 working days of agreement. On 20 September 2018, Omara offered $3.200 million, conditional on due diligence within five working days of agreement. On 24 September 2018, Ms Liu accepted Premier's 21 September 2018 counter-offer at $3.600 million, still conditional on due diligence expiring on 23 October 2018. Ms Liu was represented by a Loretta Zhang. Ms Zhang then asked Colliers for bank statements or proof of receipt of rent each month, which Colliers asked Mr Hari to supply. Mr Hari declined to do so, saying Premier was "prepared to give a six month rent payment guarantee".

[22] On 26 September 2018, Ms Liu's lawyers emailed Mr Felton, saying Ms Zhang "has advised that she is in discussions with you regarding the rental paid by one of the tenants, relief of 40%". In answer to me, Mr Felton explained, when Ms Zhang called him to "express concerns" with Unit A, he asked her to put that information in an email for his discussion with Mr Hari. Mr White said Colliers "had not previously been aware that reduced rent was being paid", although he comprehended Colliers was advised of the 40 per cent figure by Mr Hari in discussion of a query arising from Ms Zhang, which 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".

[23] On 11 October 2018, Mr White emailed Mr Finnigan to advise Ms Liu's contract remained "valid" until the end of the following week, but with reference to the tenancy schedule noted "Buza Ltd is the downstairs area (pool hall) it has come to light that the vendor is subsidising the rent here to the tune of around 40%". Mr White's evidence was 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 Mr Hotchin initially remembered the call came after the email (but under cross-examination could not recall the order). Mr Hotchin said he understood the "underwrite or a shortfall in rent" was temporary, "a short-term arrangement".

[24] In fact, by 1 October 2018, Buza was $45,060 in arrears on its due rent then of $67,860 (that is, 66 per cent unpaid) and ceased paying rent at all after 1 April 2018, although that position only then was apparent between Premier and Buza. Premier did nothing thereafter to enforce Buza's payment of rent.

[25] On 18 October 2018, Ms Zhang emailed Mr Felton under the heading "problem with the site":

> 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 .
>
> 2. Drainage problem (basement overflow)
> Checked with the professional plumber . This will be the whole building's issue: Might have to change the pump or make the chamber bigger (estimate minimum cost :$20k)
>
> 3. No Airflow and air conditioning (current cooling system not in a good working condition . For the two level 's cost to change the cooling tower is a massive job. The minimum cost for both airflow and AC over $100k
>
> 4. Fire system up to date
> 5. Emergency lighting up to date
> Fire and emergency lighting will cost minimum of $50k not including the fire engineer and light engineer's reports.
>
> 6. Upstairs body corporations future issue
> Hence we asked for a few documents from the above body corporation, they

> seems like not interested to help. They will be a big issue to deal with . Especially I think will involve a large legal bill for it .
>
> 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.

[26] 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 list of issues and conclusion to Mr Hari in advance of a telephone conversation, saying "[t]hese are all CAPEX issues which any purchaser will need address / rectify" and adding "Does the building have a current [building warrant of fitness]? As with some of the items above it does not meet code in our investigations". Mr Felton could not recall the subsequent telephone conversation with Mr Hari but obtained the impression Mr Hari "seemed like surprised or genuinely like he didn't believe that there were any issues there".

[27] Although also not recalling a telephone conversation with Mr Hari, 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. Mr White, who Mr Finnigan had asked to let him know if the Liu contract 'fell over', called Mr Finnigan to apprise him of the issues Ms Zhang had raised. 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. 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"; and Mr Finnigan responded "something along the lines of 'We want to do the deal'". Mr White had "the impression during the call that OHL would put something 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 (except for a May 2018 body corporate insurance claim) leaks in the premises.

[28] Also on 23 October 2018:

(a) at about 1.45 pm — after Mr White advised Mr Finnigan Ms Liu's contract was "looking wobbly" and, knowing "what Ms Liu was suggesting she was now at" (although he did not tell Mr Finnigan that), OHL needed to be making an unconditional $3.5 million offer — Colliers supplied a draft sale and purchase agreement relevantly in standard form,[2] for an unconditional offer of $3.500 million for Unit A for settlement on 6 February 2019, which was endorsed for OHL; and

(b) in escalating correspondence between the parties' respective lawyers, at about 1.15 pm, Ms Liu initially sought extensions to the due diligence date; at about 3.00 pm, alternatively unconditionally to acquire Unit A for $3.400 million for settlement on 11 February 2019 (the agreement then being for settlement within 30 days of unconditionality); and ultimately at about 4.45 pm for unconditional purchase at $3.500 million for settlement on that date.

Mr White explained in evidence Colliers thus obtained competing offers for Premier, of which Colliers assessed and recommended OHL's offer the more reliable and preferred. Premier accepted OHL's offer that evening.

[29] 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. But the countersigned document received back from Colliers plainly originally was signed for OHL as 'authorised signatory' and not as 'director'. The signature (and initialling) materially differs from that Mr Hotchin identified as his own signature (and therefore his initialling) on the $3.900 million and $3.200 million offers. The signatures (and initialling) on the 23 October 2018 sale and purchase agreement between OHL and Premier appear to be Mr Finnigan's and Mr Hari's signatures (and initialling).

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

[30] The concluded sale and purchase agreement included the standard vendor warranties and undertakings at the date of the agreement Premier had not "received any notice … from any tenant… or given any consent or waiver … which directly or indirectly affects the property and which has not been disclosed in writing to the purchaser" (cl 7.1(2)), and at settlement (cl 7.2(1)):

> [A]ll plant … [is] 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.

[31] After entry into the agreement, 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 Mr Hotchin) met with Mr Lee, whose company Buza occupied the basement tenancy, and Mr Lee's sister, Lauren Lee. Mr Hotchin's evidence was he understood from that discussion:

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

[32] OHL's lawyers' subsequent enquiry of Premier's lawyers as to any shortfall in rental payments elicited the response:

> 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.

[33] Meanwhile, Mr Hotchin sought a technical inspection of Unit A's air-conditioning and ventilation systems. Metropolitan Air Conditioning and Refrigeration Limited 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 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.

[34] For settlement, in terms of the sale and purchase agreement, OHL's lawyers contended Buza's rental arrangement constituted the property's misdescription and Premier's waiver, and Buza's advice to Premier of leaks in its tenancy Premier's undisclosed receipt. For the purposes of the agreement's cl 8.1(2), OHL claimed compensation amounting to $692,000 plus GST (if any). Ultimately, on settlement, that sum was deducted from the price paid to Premier and is held by lawyers Alexander Dorrington as stakeholder. Premier used the balance of funds received to pay down debt on its Tauranga property.

[35] After settlement, when Buza was unable to meet its rent arrears, OHL terminated its lease. The basement since has been untenanted, although OHL has reinstated it to a shell for subsequent lease. OHL also has decommissioned the cooling tower and does not intend replacing the air-conditioning plant until it secures a basement tenant.

[36] Finally, for trial, the parties instructed expert valuers Seagars' Reid Quinlan for OHL and Extensor Advisory Limited's Gary Cheyne for Premier:

(a) in reliance on his 6 September 2018 inspection of the property,[3] and consistently with its sale price, Mr Quinlan assessed Unit A's expected

3 See [19] above.

value on acquisition at $3.500 million (plus GST, if any) in February 2019 (when Premier's sale to OHL 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 $2.830 million, resulting in OHL's capital loss of $670,000 (excluding GST, if any);

(b) Mr Cheyne responded with five scenarios based on various assumptions as to the factual position of Unit A's acquisition as concerned the rental shortfall and condition of the air-conditioning plant, and if the acquisition was either to give the buyer complete ownership of both units in the strata title or obtained under a rental guarantee to 31 October 2020. He assessed Unit A thus was valued in February 2019 at points between $3.400 million and $3.650 million; and

(c) in caucus, the experts reached agreement as to Unit A's value in some of Mr Cheyne's scenarios.

Legal context

—Fair Trading Act

[37] Section 9 of the Fair Trading Act 1986 provides "[n]o person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive". The section is "directed to promoting fair dealing in trade by proscribing conduct which, examined objectively, is deceptive or misleading in the particular circumstances".[4] No misleading or deceptive intention or actuality is required; it is enough the conduct had that potential.[5]

—contractual warranties

[38] The sale and purchase agreement includes:

[4] *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [28].
[5] At [28]. See also *AMP Finance NZ Ltd v Heaven* (1997) 8 TCLR 144 (CA) at 152.

6.0 Title, boundaries and requisitions

…

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.

…

7.0 Vendor's warranties and undertakings

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.

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.

…

8.0 Claims for compensation

8.1 If the purchaser claims a right to compensation either under subclause 6.4 or for an equitable set-off:

(1) the purchaser must serve notice of the claim on the vendor on or before the last working day prior to settlement; and

(2) the notice must:

(a) in the case of a claim for compensation under subclause 6.4, state the particular error, omission, or misdescription of the property or title in respect of which compensation is claimed;

(b) in the case of a claim to an equitable set-off, state the particular matters in respect of which compensation is claimed;

(c) comprise a genuine pre-estimate of the loss suffered by the purchaser; and

(d) be particularised and quantified to the extent reasonably possible as at the date of the notice.

Clause 8.4 then identifies the process for deduction on settlement and payment to a stakeholder until the amount of compensation is determined, and cl 8.5 provides the foregoing subclauses "do not prevent either party taking proceedings for the specific performance of the contract".

—loss or damage

[39] Sections 43(1) and 43(3)(f) of the Fair Trading Act enable me to order Premier to pay the amount of any loss or damage suffered, or likely to be suffered, by OHL "by conduct of" Premier in contravention of a relevant provision of the Act. 'By conduct of' is to adopt a "common law practical or common-sense concept of causation",[6] to identify if "the particular claimant was actually misled or deceived by the defendant's conduct" and then:[7]

> If the court takes the view, usually by drawing an inference from the evidence as a whole, that the claimant was indeed misled or deceived, it needs then to ask whether the defendant's conduct in breach of s 9 was an operating cause of the claimant's loss or damage. Put another way, was the defendant's breach *the* effective cause or *an* effective cause?

There must be "a 'clear nexus' between the conduct and the loss or damage".[8]

[40] On a finding of such statutory liability, damages are awarded in the amount of money (so far as money can do it) necessary to put the plaintiff in the position it would have been if the Act had not been contravened; not the position it would have been in had the representation been true.[9] The "normal measure" of loss is if "what has been acquired is worth less than what was paid" including wasted expenditure,[10] and "not merely a disappointed expectation of being better off than [the plaintiffs] now find themselves".[11]

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6 *Red Eagle Corporation Ltd v Ellis*, above n 4, at [29], citing *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514 at 525.

7 At [29].

8 At [29], citing *Goldsboro v Walker* [1993] 1 NZLR 394 (CA) at 401 and referring at n 19 to *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA) at 38.

9 *Cox & Coxon Ltd v Leipst*, above n 8, at 22; endorsed by *Harvey Corporation Ltd v Barker* [2002] 2 NZLR 213 (CA) at [13].

10 *Harvey Corporation Ltd v Barker*, above n 9, at [14].

11 At [15].

[41] Distinctly, on a finding of contractual liability, damages are awarded in the amount of money (so far as money can do it) necessary to put the plaintiff in the position it would have been had the contract been performed.[12] The usual measure of loss then is "the difference between the value contracted for and the value obtained",[13] to put the plaintiff in "as good a financial position as if the contract had not been broken",[14] by reference to "the value to the party injured of the loss of the promised performance":[15]

> In cases of awards for damages for misrepresentation in contracts for the sale of land, the difference in value between the land as transferred, and had the representation been true, is normally the measure of the loss.

Those principles apply as much in assessing damages for breach of a warranty.[16] Nonetheless, they only are damages within the parties' contemplation at the time they contracted,[17] or perhaps within their then presumed contemplation.[18]

[42] In damages, the principle of mitigation qualifies the principle of compensation.[19] Mitigation issues arise after a defendant is established liable for the normal measure of damage.[20] It is open to a defendant then to prove there were reasonable steps open to the plaintiff to reduce the loss incurred, for any excess in which the defendant is not liable.[21] Whether the steps were reasonable is to be

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12 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [23], citing *Stirling v Poulgrain* [1980] 2 NZLR 402 (CA) at 419 and *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 (CA) at 539.

13 *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 12, at [27].

14 At [157], citing *Robinson v Harman* (1848) 1 Exch 850 at 855, 154 ER 363 (Exch) at 365 and *Radford v De Froberville* [1977] 1 WLR 1262 (Ch) at 1273.

15 *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 12, at [187], citing *Stirling v Poulgrain*, above n 12, at 422; and [191], citing John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (3rd ed, LexisNexis NZ, Wellington, 2007 [presently, 6th ed, Lexis Nexis, Wellington, 2018]) at [11.2.6].

16 *Western Park Village Ltd v Baho* [2014] NZCA 630, (2014) 16 NZCPR 139 at [63] and n 7.

17 *Clarkson v Whangamata Metal Supplies Ltd* [2007] NZCA 590, [2008] 3 NZLR 31 at [32], citing at [30] *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] 3 WLR 354 (HL) at [215] in restating the rule in *Hadley v Baxendale* (1854) 9 Ex 341 (Exch) (previously restated in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*, above n 12).

18 *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 AC 61 at [24], further restating the rule in *Hadley v Baxendale*, above n 17.

19 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [55] per Elias CJ citing *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 (UKHL) at 689; and approved in *Wu v Body Corporate 366611* [2014] NZSC 137, [2015] 1 NZLR 215 at [134].

20 *Williams v K F Meates and Co Ltd* (1971) 1 NZCPR 594 (CA) at 599.

21 *Lander v Sorensen* [1955] NZLR 219 (CA) at 228.

considered in light of all the circumstances (including the plaintiff's own interests).[22] But the defendant then is liable for the expense of such reasonable steps taken (whether or not effective in reducing or eliminating the loss).[23]

Discussion

—Fair Trading Act

[43] To start with the statutory cause of action, I find Premier's imputed description of Unit A in the 24 July 2018 information memorandum as "[f]ully [l]eased" in terms of the Tenancy Schedule, "[r]eturning $223,500 net p.a.", qualifyingly misleading and deceptive in the circumstances of Buza's lease performance as accommodated by Premier,[24] particularly given the information memorandum's indications of "below market" rental rates and "income security" from "[l]ong operating hospitality tenants".

[44] The misrepresentation was not corrected by the subsequent 11 October 2018 (incorrect) representations 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 established and could not establish its business at the lease's rental rate. By 1 October 2018, Buza had paid only one-third of the rent then due, and none since any concession ended on 1 April 2018.

[45] There is a question if Premier's conduct was 'in trade'. 'Trade' is defined as meaning:[25]

> … any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land.

By the transaction at issue, Premier was disposing of one of its two significant assets, the other being its commercial property in Tauranga. That may not be its trade as

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22 *Wu v Body Corporate 366611*, above n 19, at [141]; *Hooker v Stewart* [1989] 3 NZLR 543 (CA) at 547.

23 *New Zealand Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569 at 598 followed in *Dempsey v Howe* [2015] NZCA 9, (2015) 16 NZCPR 203 (CA) at [35].

24 At [13] and [24] above.

25 Fair Trading Act, s 2(1), definition of "trade".

defined.[26] The evidence is Premier was in the business of commercial property *letting*, not buying or selling.

[46] The Fair Trading Act's purpose is "to contribute to a trading environment in which the interests of consumers are protected", to which end certain unfair conduct is proscribed.[27] A one-off transaction between commercial property owners might be thought excluded. But a "broad" approach is mandated, applying to "transactions between large, sophisticated corporations as well as to those of persons dealing with consumers".[28] Mr Hari intended applying the surplus from Unit A's sale to acquisition of a further commercial property for letting. And it is what Premier does that matters.[29] As a "springboard" for Premier's continued commercial activity, the transaction was 'in trade'.[30]

[47] However, I am not satisfied either OHL was misled or deceived by Premier's contravention, or that contravention was the effective cause of any loss or damage claimed suffered by OHL. Colliers' contacts on Premier's behalf with OHL were conducted between Colliers' Mr White and OHL's Mr Finnigan. Critically, they included Mr White's 11 October 2023 email advice to Mr Finnigan "the vendor is subsidising the rent here to the tune of around 40%". If their telephone conversation was to communicate such was a temporary arrangement to assist Buza in establishing its business, there was no indication the temporary arrangement had ceased or Buza's business then was established. Even if Mr White's advice understated the extent of the subsidy in money or time or consequence, his advice was a clear indication Colliers' information memorandum could not be relied on its terms. The indication was reinforced 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".

[48] Mr Finnigan did not give evidence. No reason was given for OHL's failure or inability to call him, which it should have done to explain its contended reliance on Colliers' information memorandum in entering into the 23 October 2018 agreement

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26 *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17 at [68]–[71] and [102]–[105].

27 Fair Trading Act, s 1A.

28 *Red Eagle Corp Ltd v Ellis*, above n 4, at [26], n 13.

29 *Megavitamins Laboratories (NZ) Ltd v Commerce Commission* [1995] 6 TCLR 231 (HC) at 244.

30 *Cashmore v Sands* HC Whanganui CIV-2004-483-0007, 7 February 2007 at [217].

with Premier, particularly as Mr Finnigan executed the agreement for OHL and not Mr Hotchin.[31] Mr Hotchin's evidence he understood Buza's rent subsidy to be a temporary incentive does not carry any conclusion such subsidy had concluded. I infer what Mr Finnigan may have said would not have helped OHL's case; further, his evidence would have harmed it. Thus the weight of Mr White's evidence is strengthened and that of Mr Hotchin's evidence is reduced.[32]

[49] I have my doubts about the reliability of Mr Hotchin's evidence in any event, illustrated by his error he signed the operative sale and purchase agreement. Mr Hotchin's recollection of Karaka's unconditional $3.900 million offer was as a $3.600 million offer conditional on due diligence (still incorporating the contemporaneous sale of the Karaka property). He could not explain why his recollection diverged from the document in evidence, which appears only to have commenced in draft as he recollected, but signed by him as the unconditional offer. He said "I recall specifically asking for the due diligence clause so putting one in and then crossing it out I can't quite figure out why but it's been a long time …". Confidence is not aided by OHL's omission of Mr Hotchin from its counterclaim pleading of the 11 October 2018 telephone call: "Mr Finnigan was told in a telephone call with Colliers' Adam White that this was a temporary arrangement, effectively offered as an incentive to the tenant while Buza got its business up and running". And the coincidence of Omara's $3.200 million offer conditional on due diligence with Seagars' $3.190 million valuation suggests at least Mr Finnigan may have been aware of the latter, even if Mr Hotchin may not have done.

[50] For completeness, OHL's Fair Trading Act claim also relies on Collier's representation of the basement tenancy as open to recovering $200 weekly rent rather than the $160 illustrated on the tenancy schedule. That representation expressly referred to "[c]omparable rentals" as the basis for its assessment of market rates. There is no evidence to suggest the assessment erred. I find the particular representation not misleading or deceptive.

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31 See [29] above.

32 *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731 (CA) at [153]–[155].

[51] In any event, I do not understand why that particular representation is singled out from those for the other tenancies, all of which together indicate opportunity for larger recoveries from the tenancies on renewal or possibly rent review. But if the particular representation was relied on for entry into the 23 October 2018 agreement required evidence, of which there was none except for Mr White's 9 August 2018 communication with Mr Finnigan (recited by Mr Hotchin). And the absence of evidence from Mr Finnigan again undermines OHL's contended reliance on the representation.

[52] OHL's Fair Trading Act claim is dismissed.

—contractual warranties

[53] As for the contractual causes of action, I do not consider the information memorandum's 'description' of Unit A as 'fully leased' in terms of the tenancy schedule alone to constitute an "error, omission or misdescription of the property" for the purposes of cl 6.4 of the sale and purchase agreement. Rather, at best, the issue is if the contended breaches of warranty amount to such 'error, omission or misdescription', disentitling cancellation but affording compensation under cl 6.4.[33] I therefore turn to those warranties. But, given cancellation was not sought and compensation for breach of warranties (or Fair Trading Act damages) otherwise is, cl 6.4 itself has little impact in this proceeding.

[54] So far as cl 7.1(1)'s warranty is concerned, OHL's evidence falls a long way short of establishing Premier had failed to disclose receipt of any qualifying 'notice' or similar from any tenant. Mr Hotchin's evidence of Ms Roberts' contacts with Mr and Ms Lee as representatives of Buza — in which the Lees complained of "previous leaks in the basement space", and followed up on 31 January 2019 with copies of text messages between Mr Lee and Mr Hari and videos of leaks in May and July 2018 — is inadmissible hearsay if relied on for the truth of those communications' contents, whether between Buza and Ms Roberts or Premier.[34] I am given nothing by

33 *Property Ventures Investments Ltd v Regalwood Holdings Ltd* [2010] NZSC 47, [2010] 3 NZLR 231 at [21], citing *Lingens v Martin* (1994) 2 NZ ConvC 191,940 (CA) at 191,945 and *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 at 13, and [57].

34 Evidence Act 2006, s 17.

which to assess the communications' circumstances as providing reasonable assurance of their reliability, or of Ms Roberts' or the Lees' unavailability as witnesses.[35] Even so, I can see nothing in the communications of the requisite "directive" formality directly or indirectly to affect the property.[36] I return to the latter qualification at [57] below.

[55] And, in terms of cl 7.2(1)'s warranty, neither do I have adequate evidence for any contention 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.[37] Certainly Metropolitan's inspection appears to have identified a variety of non-operational components: one side of the tandem chiller, the main heaters in the air handler and the hydronic system above the bar in Red Pig's tenancy; five hydronic systems in Buza's tenancy; and possibly the faulty compressor in Ren He's tenancy. At best, the evidence is quantitative rather than qualitative; I cannot assess from it if those non-operational components, even if previously known to Premier, are to render the plant not in 'reasonable working order' for their age and condition. After all, the tenancies were being used, broadly for the purpose for which they were intended, with the plant in that condition.[38] But, again, Metropolitan's report also is inadmissible hearsay if relied on for the truth of its content. And, while I may contemplate the report's circumstance as providing reasonable assurance of its content's reliability, I am given nothing by which also to assess its author's unavailability as a witness.

[56] Last, turning to cl 7.1(2)'s warranty, earlier editions of the standard form agreement addressed "any consent or waiver *in relation to any application under the Resource Management Act 1991 and its amendments*". Omission of the emphasised words from the eighth edition coincided with that edition's expansion of (what became) cl 7.1(1)'s notice or demand or requisition or outstanding requirement from any local or government authority or under the 1991 Act or from any tenant to also

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35 Section 18.

36 *Sullivan v Wellsford Properties Ltd* [2017] NZHC 3047, [2019] NZCCLR 13 at [173]–[176], citing *Kaitaia Timber Co Ltd v Alternative Enterprises Ltd* [2012] NZHC 2497 at [53] and *Western Park Village Ltd v Baho* [2014] NZCA 630, (2014) 16 NZCPR 139 at [39]. Similarly, *Mitchell v Zhang* [2017] NZHC 3208, (2017) 7 NZ ConvC 96-021 at [29]–[49].

37 *McKenzie Institute International v ARCIC* (1997) 8 TCLR 329 (CA) at 331; *Property Ventures Investments Ltd v Regalwood Holdings Ltd*, above n **Error! Bookmark not defined.**, at [59].

38 *M & L Moore Ltd v Beadle* HC Auckland CP482/96, 4 December 1997 at 16, cited in *Reid v Taylor* [2023] NZHC 1231 at [54], [55] and [71].

from “any other statutory body” and “from any other party”: in other words, ‘any’ adequately directive communication. I cannot identify prior judicial consideration of cl 7.1(2)’s meaning but, consistently with commentary,[39] consider it means as it says: ‘any’ consent or waiver. Premier’s consent to Buza’s reduced payment of rent to 31 March 2018, or waiver of Buza’s non-payment of rent thereafter, suffices.

[57] But it is still only of any undisclosed consent or waiver “which directly or indirectly affects the property”. While Premier’s consent and waiver were not disclosed to OHL, the question nonetheless is if non-disclosure was of a consent or waiver “directly or indirectly affecting the property”. The ‘property’ is defined as meaning “the property described in this agreement”. The property described in the agreement is of a “stratum in freehold” at “1/2 Kitchener St, Auckland Central, Auckland City” comprised by “Unit A and Accessory Unit 1-2” on DP 115657 with the unique identifier NA65D/268, including a form of the tenancy schedule depicting Buza’s tenancy at a net rental of $62,400 expiring on 1 November 2020, renewable for one term of three years with annual consumer price index rent reviews on that anniversary.

[58] Premier’s agreement to Buza’s reduced rent to 31 March 2018, in the circumstances also of Premier’s non-enforcement of Buza’s unpaid rent after 31 March 2018, constitute respectively its consent and waiver affecting the property to the extent of its description including the tenancy schedule as to Buza’s tenancy. They were not disclosed to OHL in writing. Premier was thereby in breach of its cl 7.1(2) warranty to OHL. Given any consequential relief would be the same under either head, I need not determine if such also breaches the cl 6.4 warranty, but incline to the view it does.

—loss or damage

[59] I therefore turn to OHL’s compensation claim for loss suffered from Premier’s breach of warranty. The point of a contractual warranty is the person to whom it is

[39] Peter Nolan “8th Edition of the Agreement for Sale and Purchase of Real Estate” (Auckland District Law Society legal development seminars, multiple occasions in March 2007) at 22: “the warranty will relate to any consent or waiver of any sort”.

made is entitled to be treated as if relying on it without further enquiry.[40] Thus OHL's knowledge of the rental shortfall is immaterial, and there can be no question of its contended 'contributory negligence' as Premier asserts as an affirmative defence. Mr Cheyne's scenarios based on the rental shortfall dissipate. Uplift in value on OHL's acquisition of both units in the strata title results irrespective of warranty breach.

[60] Mr Quinlan assesses the effect of the warranty breach to be OHL's acquisition of the property "28% vacant (by net income)":

> [T]aking into account non-recoverable operating expenses from the vacant space, the net receivable income will be closer to 60% of the fully let income, until such time as a new tenant can be found. That has an impact on the amount banks will lend against investment properties, and small passive investors seeking high income yields and income leverage would be deterred. Those 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.

Accounting also for the state of the air-conditioning plant (by financing its $210,000 replacement cost), Mr Quinlan increases Unit A's "fully leased" capitalisation rate of 6.39 per cent (calculated from its $3.500 million value) "by 0.50%, to 6.89%", or a value of $3.244 million. The vacant tenancy adds a $200,311 cashflow cost, leading to Unit A's revised value of $2.830 million, meaning OHL's loss on acquisition of $670,000.

[61] The experts agree, if the air-conditioning plant was in reasonable working order (and I have held OHL has not established otherwise),[41] no further deduction would be made for its age or condition already incorporated within the higher capitalisation rate for older buildings.

[62] Mr Cheyne takes issue with Mr Quinlan's uplift to the capitalisation rate as "double counting":

> There is already investment risk arising from the nature of the space itself. This is indifferent (at best) basement space which would be difficult to lease in the best of times. There are 20 months remaining under the Buza lease which is a very short period of certainty of income to a landlord. These factors are accounted for in the base capitalisation rate of 6.4% which has led to the base transaction price of $3,500,000.

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40 *Ling v YL NZ Investment Ltd* [2018] NZCA 133, (2018) 20 NZCPR 830 at [34].

41 At [55] above.

> If there are difficulties in leasing the basement space, that stems not from the alleged non-disclosures of payments by Buza, but from the nature of the basement space itself. There is no need to further reflect the nature of the basement space by increasing the capitalisation rate.
>
> Ultimately, and particularly with 20 months remaining under the Buza lease, any adjustment to transaction price stems around cash flow issues alone.

but accepts there would be cashflow consequences from the lost income for the duration of the vacancy, at least for the period of the Buza lease. Thereafter renewal was at OHL's risk.

[63] In my assessment, the only difference in Unit A's value as acquired by OHL attributable to Premier's breach of its 7.1(2) warranty is to be drawn from the loss of income for the balance of Buza's lease. Non-disclosure of Premier's consent and waiver, even if misdescription of the property, carried nothing more than that cashflow disadvantage. Mr Hotchin's conclusion "the [basement] space was attractive to tenants and could generate income" is not an inference open to being drawn from Premier's 'no consent or waiver' warranty alone. Neither does his antipathy to Premier's proffered underwrite, as enabling Premier "to maintain a purchase price at $3.5m, based on the notional capitalised income", justify OHL not accepting Premier's offer in light of its warranty breach.

[64] Although the experts agree Premier's rent underwrite results in Unit A's $3.450 million value, that is because:

(a) they are attributing to the basement tenancy a higher $180/m2 rental value (resulting in Unit A's notional $3.612 million value);

(b) achievement of which they assess risks loss of some $90,000 rent and operating expenditure for 12 months while such a tenant is obtained and at the expense of another $17,500 in agency fees; and

(c) allowing $210,000 for air-conditioning plant replacement.

[65] Particularly given the difficulties experienced in letting the site, I see no justification in adjusting the basement tenancy above that rental sought to be recovered by Premier. Risk of vacancy after Buza's lease expires or cost of air conditioning

replacement does not differ on the warranty breach. The result is Premier's rent underwrite precisely would have covered OHL's loss on acquisition of the '28 per cent vacant' Unit A.

[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.

[67] Otherwise, OHL's contractual warranty causes of action are dismissed.

Result

[68] Accordingly, Premier is entitled to recover the $692,000 balance of Unit A's price from Alexander Dorrington, together with interest under the Interest on Money Claims Act 2016 calculated from the date of settlement, payable by OHL to the extent not recovered from interest accrued by Alexander Dorrington.

Costs

[69] In my preliminary view — from what I presently know, although Premier has obtained the relief it sought, that only is because it offered reasonable mitigation for its established (but not admitted) warranty breach — neither party can claim to be comprehensively successful, and costs therefore should lie where they fell or fall; that is, to be borne by the party incurring them.

[70] If that is not accepted by the parties and they cannot otherwise agree, costs are reserved for determination on short memoranda each of no more than five pages — annexing a single-page table setting out any contended allowable steps, time allocation and daily recovery rate — to be filed and served by Premier within ten working days of the date of this judgment, with any response or reply to be filed within five working day intervals after service.

—Jagose J