IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-1050
[2024] NZHC 1432

BETWEEN	PARAN DAMAN MUDALIAR Plaintiff
AND	ROHINEET SHARMA Defendant

Hearing: 29–30 April 2024

Appearances: R J Latton for Plaintiff
Defendant in person

Judgment: 31 May 2024

JUDGMENT OF O'GORMAN J

This judgment was delivered by me on 31 May 2024 at 4 pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Solicitors/Counsel:
Pidgeon Judd, Auckland
R J Latton, Barrister, Auckland

Copy to:
R Sharma

Overview

[1] This is a claim by Mr Paran Mudaliar against Mr Rohineet Sharma for funds invested in a development project that did not proceed. The funds were used for payment of a deposit under an agreement to acquire a property at 30 and 32–36 Warby Street, Campbelltown, New South Wales, Australia (the Property). The intention was to construct a large apartment complex on the Property (the original plan was for 99 units) and then sell the apartments at a profit (the Campbelltown project). However, the Campbelltown project did not ultimately proceed, and the deposit was forfeited when the purchaser did not complete settlement to acquire the Property.

[2] The causes of action pleaded by the plaintiff are negligent misstatement in tort, or alternatively for pre-contractual misrepresentations under s 35 of the Contract and Commercial Law Act 2017 (CCLA). There is no claim for misrepresentation under the Fair Trading Act 1986 because that type of claim was time-barred under s 43A by the time this proceeding commenced.

[3] Each of the parties gave evidence about the discussions between them leading up to Mr Mudaliar making his investment. At its core, the claim depends on a credibility assessment about whether the following representations were made:

(a) that the agreement to purchase the Property had already become unconditional and the deposit paid, so Mr Mudaliar's financial contribution was only required for paying the balance of the purchase price at settlement; and

(b) that Mr Sharma was still a lawyer and trusted advisor who could be relied on by Mr Mudaliar.

[4] For the reasons set out in this judgment, Mr Mudaliar does not have an actionable claim for misrepresentations made before his funds were invested. The circumstances did not make it reasonable for Mr Mudaliar to assume that the deposit had already been paid, without seeking clarification of that issue. Furthermore, he engaged in this investment project with Mr Sharma in his private capacity, rather than relying on him as a trusted legal advisor.

Factual background

[5] Mr Mudaliar and Mr Sharma were old friends who knew each other from primary school in Fiji. Mr Mudaliar moved to New Zealand in 1996 and reconnected with Mr Sharma from early 2000. At that time, Mr Sharma was also living in New Zealand and practising as a lawyer.

[6] Mr Mudaliar is a civil engineer. He now runs his own metal reinforcing company and is the principal of a building company. As well as working in the construction industry, at various times Mr Mudaliar has owned investment properties. These have been residential dwellings. On three or four occasions his investment properties have been subdivided.

[7] After Mr Mudaliar and Mr Sharma reconnected in New Zealand, Mr Mudaliar started using Mr Sharma as his lawyer. Mr Sharma acted for him on the conveyance of various properties and Mr Mudaliar sought advice from Mr Sharma from time to time on other matters. It seems that Mr Sharma may not have charged for some of this legal work, because he did it out of friendship.

[8] The key events for the purpose of this proceeding occurred from early 2015.

[9] That year began badly for Mr Sharma. In an oral decision given on 27 February 2015, the New Zealand Lawyers and Conveyancers Disciplinary Tribunal decided that Mr Sharma should be removed from the roll of barristers and solicitors.[1] This was because of Mr Sharma's misconduct during the purchase of a commercial property in Panmure, for which Westpac Bank required a first mortgage. To facilitate this, and without authority, Mr Sharma discharged a mortgage to BNZ over his own residential property and submitted a false solicitor's certificate to Westpac.[2]

[10] As a result, from Monday 2 March 2015, Mr Sharma had to make arrangements for someone else to take over his law firm. Mr Sheat became the principal and owner of Sharma Legal, taking over client files. Mr Sharma says that he may have been there

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1 *Auckland Standards Committee No. 2 v Sharma* [2015] NZLCDT 12 at [51].
2 At [3].

on an ad hoc basis for a couple of weeks to help with handover and tidy-up. Associated with this change, Sharma Law was later renamed Akarana Legal.

[11] As considered in more detail below, there is a critical difference between the two parties about whether the fact of Mr Sharma being struck off was discussed with Mr Mudaliar. Mr Sharma says he had a telephone call with Mr Mudaliar on Monday, 2 March 2015 in which they specifically discussed that fact, with Mr Mudaliar expressing sympathy and support as a friend. Mr Mudaliar, on the other hand, denies that any call took place. He said he was completely unaware that Mr Sharma had been struck off as a lawyer until early 2016.

[12] It is common ground that Mr Mudaliar continued to use the firm's legal services during 2015. In dispute is whether Mr Mudaliar was aware that his lawyer from that point was Mr Sheat and not Mr Sharma. This ambiguity exists partly because Mr Sharma continued to use law firm email addresses and correspond with Mr Mudaliar about legal matters. Mr Mudaliar says he never met Mr Sheat and there was no evidence before me that they ever corresponded.

(a) One of the legal matters was a conveyance of a property in Burundi Ave for Mr Mudaliar. On 16 April 2015, Mr Mudaliar forwarded the executed sale and purchase agreement for that property to Mr Sharma at his "sharmalegal" email address. On 30 April 2015, they were making arrangements for settlement. Mr Sharma emailed Mr Mudaliar with the "Sharma Legal Trust Account" bank account number. He also said, "You need to sign one form for settlement. When can you come in?". Mr Mudaliar responded that he could "swing by your office this morning".

(b) On the same day, 30 April 2015, there was another email exchange referring to a different conveyance of a property in Rata Vine Road for Mr Mudaliar's brother-in-law. Mr Mudaliar asked for Mr Sharma to please let him know the figures, then they "will transfer funds into your trust account".

(c) At the end of May 2015, Mr Mudaliar needed advice on whether he could sell back his shares to Euro Corporation. These were shares that he had been asked to buy when working for the group. He emailed Mr Sharma at his "sharmalegal" email address and Mr Sharma responded, "I will have a look and advise". On 13 June 2015, Mr Sharma responded that he had read the documents and "I can't see any reason why you should not be able to have these shares redeemed". This exchange is relied on to substantiate that Mr Mudaliar thought Mr Sharma was still practising as a lawyer. Mr Sharma says that these comments were as a friend only and he orally advised Mr Mudaliar that he would have to get legal advice from a lawyer.

[13] In one of the emails on 30 April 2015 to Mr Sharma, Mr Mudaliar listed five properties that were for sale. The reason for him providing that list to Mr Sharma was addressed by both witnesses in their evidence. It is common ground that this was a list of properties Mr Mudaliar suggested could perhaps be acquired and renovated for profit by Mr Sharma. Mr Sharma says he asked for this because he could no longer practise as a lawyer, and he needed some other way to make a living. Mr Mudaliar denies any such discussion but acknowledges that he helped Mr Sharma in this way after his friend had expressed an interest in getting into property investment (on the side).

[14] In early May 2015, Mr Sharma told Mr Mudaliar that he had purchased a property in Buckland Road, Māngere, and he sought Mr Mudaliar's assistance to renovate the house for him so that Mr Sharma could sell and make a profit. This was agreed.

[15] During the course of that renovation, Mr Sharma told Mr Mudaliar about the Campbelltown project. There were two other partners with whom Mr Sharma was undertaking this project, Mr Patel and Mr Reddy. There were at least two in-person meetings during May 2015 in which Mr Sharma discussed this Campbelltown project with Mr Mudaliar. I will return to the disputed detail of these discussions later, as these form the basis of the alleged misrepresentations for the two causes of action.

[16] If all had gone to plan, based on the development and sale of 99 units producing a total net profit of around AUD 10 million, Mr Sharma and Mr Mudaliar hoped to make a profit of more than AUD 1 million each. Anticipated profits later increased when the number of intended units increased.

[17] Mr Mudaliar believes it was early June 2015, some three weeks after the Campbelltown project was first mentioned, when he made the decision to invest in the project through Mr Sharma. Mr Mudaliar advised Mr Sharma that he only had AUD 380,000 to invest, not the AUD 400,000 that Mr Sharma requested.

[18] On 4 June 2015, Mr Sharma made a payment of AUD 20,000 for the Campbelltown project. That payment was made into the real estate agent's trust account with the Commonwealth Bank of Australia. The fact that this is the difference between the requested investment of AUD 400,000 and Mr Mudaliar's payment of AUD 380,000 suggests that Mr Mudaliar's decision to invest had been made by 4 June 2015 and discussed with Mr Sharma.

[19] The two agreements for the sale and purchase of the Property to be used for the Campbelltown project were signed on 5 June 2015 (although Mr Sharma maintains that he had not seen them at the time, nor had Mr Mudaliar).

(a) The purchaser under the agreements was Real Sand Box Pty Ltd.

(b) The completion date was specified as 10 months after the contract date. A contract date of 5 June 2015 therefore resulted in a completion date of 5 April 2016.

(c) The purchase price was for a total of AUD 8 million, with the deposit specified as being AUD 400,000 (overriding the default deposit of 10 per cent specified in the terms).

(d) The standard terms of the contract required the deposit to be paid to the "depositholder" as stakeholder. This was defined as the vendor's agent or vendor's solicitor.

[20] On 11 June 2015, they progressed plans for Mr Mudaliar to pay his AUD 380,000. In an email on that date, sent from the domain "sharmalegal", Mr Sharma forwarded on the trust account details of the Sydney real estate agent selling the property, Georgie O'Meara, along with a copy of her business card and a deposit slip with account name "GO TO REAL ESTATE PTY LTD TRUST ACCOUNT", ABN reference 35 600 542 390. Mr Pat Patel's email was also in the email chain. Mr Sharma said to Mr Mudaliar: "I will pay another $120K oz tomorrow. I suggest u do a bank draft and I could take it with me when I go on Mon". He also said he would draft a simple agreement between the two of them detailing their arrangement for this and "the future project".

[21] On cross-examination, Mr Sharma said the AUD 120,000 figure was a mistake and he meant to say AUD 20,000. Mr Latton on behalf of Mr Mudaliar emphasised that even that explanation made no sense, because the AUD 20,000 amount had already been paid by electronic transfer. Mr Latton said that the figure of AUD 120,000 was instead designed to look like a top up for the half share Mr Mudaliar was acquiring of Mr Sharma's AUD 1 million investment contribution (giving a one third equity entitlement in the Campbelltown project), perhaps implying that Mr Sharma's own contribution had already been paid.

[22] Mr Sharma's position was that by 15 June 2015 he had not represented to Mr Mudaliar that he had already made payments to acquire the Property, because he expressly told Mr Mudaliar that he was not prepared to do so until he had looked at the Property himself during his trip to Sydney. Mr Mudaliar agreed that Mr Sharma told him he had not seen the land and was going there to see it but maintained Mr Sharma had nevertheless represented that he "had already invested into the project itself".

[23] On 15 June 2015, Mr Mudaliar paid his AUD 380,000 into the real estate agent's trust account. At the conversion rate that day, this was a payment of NZD 428,031.23. The only documents that Mr Mudaliar had seen about the Campbelltown project by this the time was a listing brochure by the vendor's real estate agents, O'Meara Estate Agents, Ms O'Meara's business card, and her trust account deposit slip. The brochure was not in evidence at trial. All of the rest of

the information about the Campbelltown project came from oral discussions with Mr Sharma. Mr Mudaliar says he did not consider this unusual because Mr Sharma was a close friend and trusted advisor.

[24] On 19 June 2015, GJ Building & Contracting Pty Ltd submitted its proposal to design and construct the project. Mr Sharma forwarded a copy to Mr Mudaliar the next day. The quotation was a price of approximately AUD 28.9 million plus GST. The quotation was valid for acceptance for a period of 30 days, with a five per cent advance payable on acceptance (AUD 1,445,000 plus GST). It seems this was superseded by a replacement quotation at a price of approximately AUD 27.3 million, providing for a 2.5 per cent deposit (AUD 683,375 plus GST), signed in acceptance by Mr Patel and Mr Reddy. On 25 August 2015, Mr Sharma signed the resulting contract in Australia, with the contract sum of approximately AUD 27.3 million plus GST. On 11 September 2015, Mr Sharma paid AUD 300,000 to GJ Building & Contracting Pty Ltd, in partial payment of an invoice issued for the deposit.

[25] On 27 June 2015, a company called Global Capital Corporation (GCC) was appointed to assist with sourcing finance for the Campbelltown project. On 23 July 2015, GCC presented a proposal for obtaining finance. This proposed borrowings of AUD 38.5 million based on 80 per cent of the Gross Realisable Value of the project. It was also based on a minimum AUD 35 million of pre-sales being evidenced to the lender. The mandate was signed by Mr Sharma with the date of 17 September 2015 — it provided for payment of AUD 22,880 as an engagement fee. Mr Sharma paid that sum on 24 September 2015.

[26] By 20 August 2015, Mr Mudaliar had not received any documentation about his investment. He emailed Mr Sharma using Mr Sharma's new "Akarana Legal" email address saying, "would be good to put something on paper for the funds introduced for Campbelltown project". In replies sent on 30 August 2015 from the Akarana Legal email address, Mr Sharma said that he had been in Sydney too between 22 and 26 August. He said he: "Went to sign the building contract and the loan agreement etc". As referred to above, during his visit to Sydney, Mr Sharma had signed a building contract on 25 August 2015 with GJ Building and Contracting Pty

Ltd (Mr Sharma signed as a director of Lambert McCabe Properties Ltd), but no loan agreement had been signed.

[27] As requested, Mr Sharma sent a draft agreement later that evening of 30 August 2015. Mr Sharma followed up again on 1 September 2015 asking whether the agreement was "ok", noting that there was one mistake that Mr Mudaliar had paid AUD 380,000 and not AUD 400,000. Mr Mudaliar replied to the 30 August 2015 email on 3 September 2015 noting the same mistake, but otherwise saying the draft "looks OK". He had just returned himself from a trip to Sydney and said he had driven past the Campbelltown property.

[28] Mr Mudaliar sent chase-up emails on 28 October and 9 December asking for the change to be made and the agreement signed. It was eventually signed on 18 December 2015. The full substantive terms of that Deed are set out below:

> 1. [Mr Sharma] is the director and one of the shareholders in Lambert McCabe Property Pty Limited ("the company"), a registered company in NSW, Australia, and having its parent registered company, Lambert McCabe Properties Limited, at Auckland, New Zealand.
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> 2. The Company has purchased land described as 32-36 Warby Street, Campbelltown, Sydney, NSW, Australia.
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> 3. The Company will construct 99 units at the said land, such construction to commence on or about February 2016 and take approximately 18 months to complete.
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> 4. The Company will borrow bank finance to complete settlement of the purchase of the land and construct the said dwellings.
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> 5. [Mr Sharma] has offered [Mr Mudaliar] the opportunity to invest funds in the said development, and [Mr Mudaliar] has agreed to and contributed AUD$380,000.00 towards the purchase of the land, the purchase price being AUD$8,500,000.00.
>
> 6. [Mr Mudaliar] and [Mr Sharma] are equal partners in the said development and construction of the dwellings and each hereby agree to equally share [Mr Sharma's] share of the net profit (if any) derived from the sale of units.

[29] For reasons that are somewhat unclear but related to lack of pre-sales and/or action or ability on the part of the other investors (Mr Patel and Mr Reddy) to obtain finance, the Campbelltown project did not ultimately proceed. Mr Sharma travelled to Sydney during early 2016 to try to progress the step of acquiring finance to fund

completion of the purchase and the construction project. He said that potential lenders required further information and evidence of pre-sales and sufficient equity, and this had not been forthcoming.

[30] By April 2016, no finance had been arranged and it was clear that the purchaser would not be able to complete settlement. On 14 April 2016, the vendors' lawyers wrote to the purchaser's lawyers, responding to a request that the existing contract be rescinded and simultaneously replaced with a new contract. The vendors' lawyers listed several requirements before their client would make a formal decision on that request. Among other things, they required payment of $411,000 into the law firm's trust account. Those steps were never taken.

[31] In late July 2016, Mr Mudaliar visited Sydney and drove past the project site. He was surprised to see that nothing had happened on the section. He said that seeing this lack of progress made him want to withdraw his investment, so he spoke with Mr Sharma in early August 2016 upon his return from Sydney. This led to a number of text exchanges with Mr Sharma about withdrawing from the Campbelltown project and getting back their investment.

[32] On 14 September 2016, Mr Sharma said that he had discussed this with the other investors who respected their decision and said that they "will try and pay back our investment by the end of Nov".

[33] By 7 February 2017, their investments had still not been repaid. Mr Sharma sent a text to Mr Mudaliar saying, "I'm hoping to get the funds sorted by the end of Mar/April. Thanks for ur patience". Despite a number of follow-up texts, no progress had been made by August 2017.

[34] On 3 August 2017, Mr Mudaliar asked Mr Sharma to send him a copy of the sale and purchase agreement. Mr Sharma responded that he did not have any documents but that he would try to get them. Mr Mudaliar was in Sydney at the time and was trying to investigate matters by contacting the lawyers or the real estate agents. As a result of those investigations, he stated the following in a text sent to Mr Sharma on 28 August 2017:

> Bro, I have just found out that there was only 5% deposit on the purchase so if the purchase price would have been 8mill than deposit would have been $400k. The contract went unconditional but did not settle. It's on the market again with an offer. Asking 7.6 to 7.8mill. Bro I trusted you so much and you do this to me. DSSLaw were the lawyers. I am back tomorrow so we can catch up if you want.

[35] Mr Sharma responded to assure Mr Mudaliar that he had never cheated him, nor had he ever intended to do so. Mr Sharma had himself ended up spending over AUD 400,000 on the project, which he was also trying to get returned. He said, "I will ensure that you get your money back, whether it's through the others or my own sources".

[36] That has never occurred, which led to the commencement of this proceeding.

Legal principles

Misrepresentations

[37] Common to both causes of action is a requirement that misrepresentations were made. The traditional view is that an actionable representation must refer to a matter of fact, either an existing fact or a past event. A representation as to some future event may amount to a representation of present fact if it implies that there is a current factual basis for the view expressed as to the future.[3] For example, a representation as to the future profitability of a business may carry an implied representation that the current state of the business provides a proper foundation for the prospects stated.[4]

[38] In some circumstances, the maintaining of silence or the failure to raise a matter may amount to a misrepresentation. The maintaining of silence may make other statements that have been made misleading or incorrect in all the circumstances.[5] Silence or reticence in itself does not constitute a misrepresentation unless there are circumstances creating a duty to speak, and it may accordingly be relevant to establish

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3 Stephen Todd and Matthew Barber *Laws of New Zealand* Contract (online ed) at [181]. In *Shiu v Luo* [2024] NZCA 48 at [73], the issue was whether the promisor had any intention of carrying out an intention of broader profit-sharing.

4 *Ware v Johnson* [1984] 2 NZLR 518 (HC); *New Zealand Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569 (HC); and *Bird v Bicknell* [1987] 2 NZLR 542 (HC).

5 Francis Cooke *Laws of New Zealand* Misrepresentation and Fraud (online ed) at [15].

whether the defendant became aware that the plaintiff had been misled by what the defendant had said,[6] particularly on issues of fundamental importance.

[39] In the recent case of *Shiu v Luo*,[7] the Court of Appeal considered questions of misrepresentation and causation of loss in a property development context. The appellant Ms Shiu embarked on property development strategy and enlisted other investors to help fund some of the property acquisitions, pursuant to terms of joint venture agreements. Respondents Mr Luo and Ms Yip claimed they were induced to enter their agreements by two misrepresentations: (1) that commission was payable to a real estate agent; and (2) that profit sharing would be across the whole development, not just the properties subject to the agreement they signed. The Court of Appeal overturned the High Court's judgment.

(a) The first misrepresentation about commission had been made but was not causative of loss. Rather than taking a "but for" approach to honest dealing, the correct approach was to focus on the commission representation itself.[8] The Court of Appeal accepted that Mr Luo and Ms Yip would not have gone into business with Ms Shiu had they known she was lying about the commission.[9] However, later affirming the contract after knowing about the breach broke any causal link to the claimed loss.[10]

(b) The second misrepresentation was only raised in the pleadings two years after the claim was filed.[11] It was also inconsistent with the terms of the joint venture agreements and individual autonomy, and there was no contemporaneous or subsequent record of it.[12] There was an obvious need for machinery to achieve an all-encompassing scheme to bind all owners of property in the wider development, yet nothing was

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6 At [15], referencing *Ware v Johnson*, above n 4; *Sturley v Manning* HC Auckland, A 611/82, 19 December 1984; *King v Wilkinson* (1994) 2 NZ ConvC 191,828; and *March Construction Ltd v Christchurch City Council* (1995) 6 TCLR 394.

7 *Shiu v Luo*, above n 3.

8 At [113]–[114].

9 At [115].

10 At [121].

11 At [77].

12 At [81]–[84].

documented,[13] including the wider risks involved.[14] Overall, there was insufficient cogent evidence to establish any such representation on the balance of probabilities.[15]

Contract and Commercial Law Act

[40] The CCLA provides, broadly, that liability in contract exists where there is any misrepresentation, whether innocent or fraudulent, made by one contracting party to another contracting party, which induces the latter to enter the contract.[16]

[41] The prerequisites to formation of a contract are:[17]

(a) an intention to be immediately bound (at the point when the bargain is said to have been agreed); and

(b) an agreement, express or found by implication, or the means of achieving an agreement (e.g., an arbitration clause), on every term which:

(i) was legally essential to the formation of such a bargain; or

(ii) was regarded by the parties themselves as essential to their particular bargain.

[42] Issues of contractual certainty were considered in *Chang v Lee.*[18] In that case, the appellant (Mr Chang) advanced $275,000 to the respondent (Ms Lee, his niece), to buy a house in Sunnynook, Auckland. The details of the transaction were never specified, consistent with an informal family arrangement underpinned by mutual trust

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13 At [100].
14 At [101].
15 At [104].
16 Contract and Commercial Law Act 2017, s 35(1)(a) (formerly Contractual Remedies Act 1979, s 6(1)(a)); and Stephen Todd and Matthew Barber *Laws of New Zealand* Contract, above n 3, at [180].
17 *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA) at [53]; and Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at [3.8].
18 *Chang v Lee* [2017] NZCA 308, [2017] NZAR 1223 (CA).

rather than commercial imperatives. The High Court found there was no contract, and this was not challenged on appeal. The High Court nevertheless imposed a type of loan arrangement through a hybrid of contractual and equitable concepts[19] — this aspect was overturned on appeal. In assessing the role of resulting trust concepts, the Court of Appeal observed that there can be no presumed intention of a contractual nature about the terms and conditions on which the money was received if one never existed.[20] On the facts, orders declaring a resulting trust were substituted.

[43] A party seeking to establish misrepresentation must establish that the misrepresentation induced that party to enter the contract.[21] Among other things, this requires proof that the representor intended to induce the representee to contract, or that the representor's conduct was such that an ordinary person in the shoes of the representee would be induced to enter the contract.[22]

[44] The CCLA provides for three distinct types of remedy for misrepresentation: damages, cancellation, and relief orders.[23] Where the remedy sought is damages, the representee is entitled to damages "as if the representation were a term of the contract that has been breached".[24]

Negligent misstatement

[45] The tort of negligent misstatement has been developed with care, having a specific focus and narrow ambit, so as not to cut across hallowed principles of contract.[25]

(a) As a matter of general principle there is no doubt that a negligent misstatement type of duty of care may attach to representations made in the course of pre-contractual negotiations.[26] However, s 35 of the

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19 At [17].
20 At [22].
21 Stephen Todd and Matthew Barber *Laws of New Zealand* Contract, above n 3, at [191].
22 *Savill v NZI Finance Ltd* [1990] 3 NZLR 135 (CA) at 145.
23 Contract and Commercial Law Act, ss 33–59.
24 Section 35(1).
25 See Stephen Todd (ed) and others *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at [59.4.8.2].
26 At [59.4.8.6(4)].

CCLA operates to supersede such rights in tort or in deceit for any party induced to enter into a contract by a misrepresentation.

(b) Section 35 does not apply if no contract ever eventuates. In that circumstance, however, a duty of care founded on a pre-contract statement may be denied for good reasons of policy.[27] In *Prime Commercial Ltd v Wool Board Disestablishment Co Ltd*, the Court of Appeal held that an attempt to use the tort of negligence to make up for the lack of a process contract should be rebuffed on policy grounds.[28]

[46] In *Carter Holt Harvey Ltd v Minister of Education,* the Supreme Court referred to requirements that must typically be met before a plaintiff is owed a duty of care in connection with a statement or advice (which must reflect proximity and policy considerations):[29]

> The necessary relationship between the maker of the statement and the recipient will typically arise where:
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> (a) the advice is required for a purpose that is made known (at least inferentially) to the adviser;
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> (b) the adviser knows (at least inferentially) that the advice will be communicated to the advisee specifically or as a member of an ascertainable class;
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> (c) the adviser knows (at least inferentially) the advice is likely to be acted on without independent inquiry; and
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> (d) the advisee does act on the advice to its detriment.

[47] If such a duty is owed, then liability for negligent misstatement requires breach (misrepresentation) and causation of loss. The question of reasonable reliance

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27 At [59.4.8.6(4)].

28 *Prime Commercial Ltd v Wool Board Disestablishment Co Ltd* (2006) 7 NZCPR 697 (CA) at [32] and [38]–[39]. See similar policy issues including legislative context referred to in *Onyx Group Ltd v Auckland City Council* (2003) 11 TCLR 40 (HC) at [54] and [61]; *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [20]–[28] and [59]–[61]; and *Tasman District Council v Buchanan* [2024] NZCA 133 at [115].

29 *Carter Holt Harvey Ltd v Minister of Education*, above n 28, at [80], cited in *Tasman District Council v Buchanan*, above n 28, at [88].

underlies the tort and is relevant to whether a duty arises (and if so, its scope), and causation of loss.[30]

[48] In *Tasman District Council v Buchanan,* the scope of any duty of care owed by the Council with its 2009 and 2012 pool inspections did not extend to taking care to protect property owners from economic loss.[31] Rather, the purpose was promotion of the safety of young children.[32] There was no continuing responsibility for checking whether the building code was complied with during construction.[33] The owners did not act on the advice to their detriment as a result of the inspections. Before the 2009 and 2012 pool inspections the defects already existed, and the owners did not have proceedings in contemplation.[34] Nothing changed as a result of the 2009 and 2012 pool inspections. Both the first and fourth requirements of the proximity test were not met, so no relevant duty was owed.[35]

[49] Whether contributory negligence is available as a defence to negligent misstatement has not been definitively determined.[36] Negligent misstatement may be pursued in the alternative to a Fair Trading Act claim, or an estoppel cause of action.[37]

Pleadings and submissions

[50] The statement of claim alleges that, at various times between 3 June 2015 and 18 December 2015, Mr Sharma made the following statements to Mr Mudaliar:

1. The Company had purchased land at 32–36 Warby Street, Campbelltown, Sydney, New South Wales Street, Australia ("the Property");

2. The purchase price for the Property was AU$8,500,000;

3. That Mr Sharma had invested his own money into the purchase of the Property;

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30 *Tasman District Council v Buchanan*, above n 28, at [107] and [115]; *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) at [30]–[32]; and *Body Corporate No 207624 v North Shore City Council [Spencer on Byron]* [2012] NZSC 83, [2013] 2 NZLR 297 at [199].

31 At [93] and [110].

32 At [89] and [107].

33 At [90].

34 At [97] and [113].

35 At [99].

36 See *Todd on Torts*, above n 25, at [59.4.8.4], because the issue would usually be accounted for by assessing reasonable reliance.

37 *McDonald v Attorney-General* HC Invercargill CP 13/86, 20 June 1991; and *Fairnington Investments Ltd v New Zealand Kiwifruit Marketing Board* HC Auckland CP 360/94, 6 July 1995.

4. That the Company would construct 99 units on the Property with construction commencing in November 2015 to February 2016 ("the Development");

5. That any money invested by Mr Sharma [sic] would be used as a contribution to the purchase price of the Property;

6. That Mr Mudaliar and Mr Sharma would be equal partners in the Development and would equally share in Mr Sharma's share of the net profit from the Development

[51] The claim pleads that, in reliance upon those statements, Mr Mudaliar advanced AUD 380,000 for the purpose of investing in the development.

[52] Under the first cause of action for negligent misstatement, it is alleged that Mr Sharma was negligent in making the statements, in that "he ought to have known that the Company had not purchased the Property". Mr Mudaliar pleads that he would not have invested in the company in respect of the project, but for those statements.

[53] The relief sought is repayment of the investment money that he lost, taking into account a sum of NZD 15,000 repaid to him on 15 March 2019.

[54] The pleading in respect of the second and alternative cause of action for pre-contractual misrepresentation is similar. It relies on the Deed dated 18 December 2015 as the relevant contract. It pleads various statements made in respect of that profit sharing agreement, including that "the Company had purchased the Property" and that "the money invested by Mr Sharma would be used as a contribution to the purchase price of the Property". The same loss is sought by way of relief under this second cause of action.

[55] The submissions during the hearing on behalf of Mr Mudaliar differed in significant respects from the pleading. In the closing submissions, the actionable representations were alleged to be the following:[38]

a. *A company associated with* Mr Sharma had entered into a sale and purchase agreement to purchase land at 30 and 32–36 Warby Street, Campbelltown, Sydney, New South Wales, Australia ("the Property");

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[38] Emphasis added.

b. *A deposit had been paid*, but the company had not settled the purchase of the Property;

c. The purchase price for the Property was AU$8,500,000;

d. That Mr Sharma had invested his own money into the purchase of the Property;

e. That any money invested by Mr Mudaliar would be used as a contribution to the purchase price for the completion of the purchase of the Property;

f. That Mr Mudaliar and Mr Sharma would be equal partners in the Development and would equally share in Mr Sharma's share of the net profit from the Development.

[56] In submissions at the hearing, counsel for the plaintiff analysed the claim for the first cause of action in the following way:[39]

(a) Was there a false statement? The key factual issue for determination is whether Mr Sharma represented to Mr Mudaliar that the deposit for the sale of the property had been paid prior to Mr Mudaliar investing his AUD 380,000 or did, as Mr Sharma asserts, Mr Sharma tell Mr Mudaliar that his money was to be used as a deposit? The plaintiff alleges the former and asserts that is consistent with such documentary evidence that exists, the surrounding circumstances, and Mr Sharma's lack of credibility. Mr Mudaliar says he would never have invested at all had he known that the full deposit was being met with his money alone, because a deposit is subject to forfeiture, and this meant he bore all the risk of failing to complete settlement.

(b) Was there a duty of care? In circumstances where it is reasonable for a plaintiff to rely on statements, there is a high correlation with a duty of care being owed to the plaintiff. This element can therefore be addressed with the next one.

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[39] Based on the elements of the tort as formulated by the Court of Appeal in *Carter Holt Harvey v Minister of Education* [2015] NZCA 321, (2015) 14 TCLR 106 at [112] — the decision to strike out the negligent misstatement claim was overturned on appeal without any particular criticism of these elements: *Carter Holt Harvey Ltd v Minister of Education*, above n 28, at [85].

(c) Was it reasonable for Mr Mudaliar to rely on what Mr Sharma said? Counsel for the plaintiff says it was reasonable for Mr Mudaliar to rely on what Mr Sharma said without further enquiry because Mr Sharma was a close friend, trusted legal advisor, and the person with all of the information about the project.

(d) Was there resulting loss? There is no dispute as to resulting loss if the other elements of the tort of negligent misstatement are established.

[57] Counsel for the plaintiff primarily relied on the negligent misstatement cause of action, conceding that it was difficult to categorise the relationship as contractual but, in any event, saying that the same analysis generally applied. Given that expectation damages are not sought, there is no practical difference in terms of outcome between the two causes of action.

[58] The defendant's position is that he provided accurate information to the plaintiff throughout about the nature and risks of the Campbelltown project. Even if these were not recorded in writing, there was no need to do this because everything had been discussed verbally between them. In particular:

(a) Mr Sharma was adamant that a telephone conversation took place on Monday, 2 March 2015 in which they discussed that Mr Sharma had been struck off. That is why, during much of 2015, they met at coffee shops and talked about his intention to invest in properties to make a living. Any correspondence using the law firm email addresses was done merely to assist as a friend and facilitator, without at any time representing that he had any ongoing role as a lawyer.

(b) In respect of the May 2015 discussions, Mr Sharma was adamant that he expressly told Mr Mudaliar that the AUD 400,000 payment was needed to pay the deposit.

(c) There had been no pressure on Mr Mudaliar to join with Mr Sharma in this investment project. Mr Sharma had simply provided that

opportunity as a friend. The investment had the prospect of very large returns if successful. The success or failure of the venture simply reflected general risks of investment.

(d) Mr Sharma himself lost a lot of money in the project. While he has undertaken every effort to recover their investments, ultimately he does not now accept any legal responsibility to meet that liability himself.

Analysis

Contract and Commercial Law Act

[59] If the alleged misrepresentations induced Mr Mudaliar to enter into a contract, then the rights under s 35 of the CCLA apply instead of any cause of action in the tort of negligent misstatement. Therefore, it is logical first to consider whether the parties entered into a contract.

[60] It was not seriously contended in the trial that the provisions of the 18 December 2015 Deed (set out at [28] above) were sufficient to satisfy the certainty requirements for formation of a contract. In particular, the parties did not reach an express or implied agreement about every term that would be legally essential to the formation of a bargain that addresses the present situation.[40]

[61] For example, para 5 of the substantive terms refers to Mr Sharma offering the opportunity to invest funds in the development and para 6 refers to Mr Sharma and Mr Mudaliar being equal partners in the development and construction of the dwellings with an intention of sharing profits equally. However, this does not address the corporate structure and how the entitlements legally relate to that company (as purchaser) and the other two investors, Mr Patel and Mr Reddy. It is unclear whether the respective contributions by the four investors were to be documented as loans to the company, or as capital for the issue of shares, or some combination. How the profits were to be distributed by the company was also unaddressed. There were no terms about the risks and obligations of the respective investors for completion of the

[40] See [41] above.

Property purchase through to construction and sale of the units, and how expenses would be met prior to any loan being drawn down. Like the informality adopted in *Chang v Lee*,[41] these details were never specified because Mr Mudaliar and Mr Sharma took a very informal approach.

[62] The danger of not agreeing and documenting arrangements properly is that contractual remedies are not available when things go wrong. The Court cannot fill material gaps of this significance with presumed intentions of a contractual nature.[42]

[63] Even if the 18 December 2015 Deed were treated as a sufficiently certain contract governing all essential terms, the CCLA claim would fail because of the requirement to establish misrepresentations that reasonably induced the plaintiff to enter the contract. I do not consider this was established on the facts, for the reasons discussed in relation to the negligent misstatement cause of action.[43]

Negligent misstatement — duty of care

[64] For the negligent misstatement cause of action, the first issue is whether Mr Sharma owed Mr Mudaliar a duty of care for his statements about the Campbelltown project. In respect of the four requirements that typically arise for a sufficiently proximate relationship to impose a duty of care, I make the following preliminary comments:

(a) The information was being provided from Mr Sharma to Mr Mudaliar so he could decide whether he wanted to participate in the investment opportunity, although I would not characterise the information as "advice". The starting position with discussions of that nature would usually be that each person is acting in their own interests rather than in a relationship of advisor and advisee. Mr Mudaliar says Mr Sharma continued to be his trusted legal advisor, but on the facts he was not purporting to advise Mr Mudaliar in that capacity for this Campbelltown investment opportunity. That was an opportunity that

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41 See [42] above.
42 See [42] above.
43 See [66]–[76] below.

he was offering in a private capacity because of their longstanding friendship.

(b) Mr Sharma was communicating directly with Mr Mudaliar.

(c) There was nothing to prevent Mr Mudaliar from making independent enquiry (such as seeking independent legal advice) or asking for further information and seeking agreement about the terms on which the investment would be made (including with the other two investors). Given that Mr Sharma was the source of the opportunity and had the connections with the other two investors, I accept he might have realised Mr Mudaliar was not choosing to seek further information or agree essential terms of the investment, but a failure by choice to take those self-protection steps is different from circumstances where the advisee is reasonably expected not to undertake independent enquiry. Mr Mudaliar had been provided with the business card of the real estate agent to whom he made his payment, and at the very least had the opportunity to contact her with any questions about the basis on which the payment would be received.

(d) The fourth requirement of detrimentally acting on advice is connected with questions of breach and causation, which I address below.

[65] This is a situation where the plaintiff wants the tort of negligence to make up for a lack of contractual entitlement, in circumstances where the Fair Trading Act already provides some statutory protections. There is no policy reason for recognising a tortious duty of care to fill a gap. In any event, my assessment is that the claim for negligent misstatement fails on these facts because of the reasonable reliance requirement.

Negligent misstatement — misrepresentations and reliance

[66] At the hearing, the claim was based on an alleged representation that the deposit had already been paid by the time Mr Sharma made his investment. However, that particular allegation was not pleaded. As the Court of Appeal found in *Shiu v Luo*,

that is significant in terms of assessing the cogency of the evidence that the alleged misrepresentation was made and relied on.

[67] The Deed that was eventually executed in December 2015 makes no reference to payment of the deposit, nor did Mr Mudaliar assert in his witness evidence that there had been any express discussion about payment of the deposit. Rather, this is an inference that Mr Mudaliar has allegedly taken from the representation that the company "has purchased the land", despite him also knowing that both equity funds and finance were still needed "to complete settlement of the purchase of the land".

[68] In the circumstances, any reference to the land having been purchased must (at most) mean that the company as purchaser had entered into an enforceable agreement to acquire the land. Mr Mudaliar relies on this as having a corresponding implication that the deposit must have been paid, because deposits are generally payable upon the making of a contract. In this case, the sale and purchase agreements had the following clauses:

> 2.2 *Normally*, the purchaser must pay the deposit on the making of this contract, and this time is essential.
>
> 2.3 If this contract requires the purchaser to pay any of the deposit by a later time, that time is also essential.

[69] On Mr Sharma's version of the facts, he expressly told Mr Mudaliar that his investment was needed to pay the deposit. On Mr Mudaliar's version of the facts, he never asked about the position. This is inconsistent with his assertion that he would never have embarked on the investment without knowing that the deposit had already been paid by the other investors. Whichever is the true position, Mr Mudaliar made his payment to the vendor's real estate agent. Even though Mr Mudaliar is not a lawyer, I find this must have triggered a suspicion that he might be paying the deposit. Mr Mudaliar must have been aware from his previous residential property investments and related conveyancing that the deposit is usually paid to the real estate agent, and the post-deposit balance of the purchase price is held in the trust account of the purchaser's solicitor and paid only upon settlement (with the conveyance); it is not paid to the vendor or the vendor's real estate agent beforehand.

[70] A deposit is both part payment of the purchase price and an earnest for the future performance of the contract by the purchaser.[44] As an earnest, it is liable to forfeiture by the vendor if the purchaser does not complete the contract.[45] As a part payment, it is credited to the purchaser on settlement. The fact that Mr Mudaliar's contribution was recorded in the Deed as being "towards the purchase of the land" is consistent with it being a deposit.

[71] Mr Latton (on behalf of Mr Mudaliar) submitted that the text message sent on 28 August 2017 showed Mr Mudaliar was unaware his funds were to be used for the deposit. However, on closer examination that text does not express surprise that his funds were part of the deposit as such. Rather, he seemed surprised that the deposit was only five per cent, so the entirety of the deposit was AUD 400,000, meaning that the other investors did not have their own additional deposit funds at risk of forfeiture. The difficulty is that neither Mr Sharma nor Mr Mudaliar had seen the sale and purchase agreement in 2015, nor had they asked to see it. As already noted, Mr Mudaliar could have asked about the position with payment of the deposit if this was important to him but did not do so.

[72] In respect of the remaining representations pleaded in the statement of claim:[46]

(a) The change of wording at the hearing to "a company associated with Mr Sharma has entered into a sale and purchase agreement…"[47] seems to acknowledge the broader nature of the representation actually made. On the facts, the name of the company was not material to Mr Mudaliar's investment decision, so long as Mr Sharma had the requisite association, contracting authority and profit distribution entitlement. By the time the payment was made, the sale and purchase agreements for the Property had been signed, and the evidence indicates an intention that Lambert McCabe Property Pty Ltd was to be nominated/substituted as purchaser (with a corresponding existing

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44 D W McMorland *Sale of Land* (4th ed, Cathcart Trust, Auckland, 2022) at [7.01], referencing (among others) *Martin v Finch* [1923] NZLR 570 (HC).
45 At [7.01].
46 See [50] above.
47 See [55] above.

interest), so there is no evidence that the earlier representations, or the terms of the 18 December 2015,[48] were misleading in any way that is material for the pleaded causes of action.

(b) The purchase price for the Property was AUD 8 million, rather than AUD 8.5 million, but there was no assertion that this would have made any difference to Mr Mudaliar's investment decision or that the difference was causative of loss.

(c) In terms of the representation that Mr Sharma had invested his own money into the purchase of the Property, I accept Mr Sharma's evidence that he indicated he wanted to see the property during his trip to Sydney in June 2015 before contributing the bulk of his share. In any event, the alleged representation was true to the extent that Mr Sharma had paid AUD 20,000 on 4 June 2015. I also find it lacks credibility to allege any representation that the investor equity would be wholly applied to the Property purchase, as opposed to the other expenses involved in getting the project underway, given that Mr Mudaliar knew that the company needed to borrow bank finance to complete settlement of the purchase of the land and construct the units,[49] and necessary expenses were being incurred in the meantime.[50] Mr Sharma's subsequent investments included:

(i) AUD 300,000 paid on 11 September 2015 to GJ Building & Contracting Pty Ltd for a deposit;

(ii) AUD 22,880 paid on 24 September 2015 as the engagement fee to GCC as lending brokers; and

(iii) travel to Sydney and other disbursements, attempting to progress the project.

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48 See [28] above.
49 Expressly recorded in the Deed — see [28] above.
50 See [24] above.

I am not clear how the above expenditure was to be accounted for in terms of the company structure and equity contributions for financing the Campbelltown project. Regardless, on the evidence before me, I am satisfied that Mr Sharma also made these investments in the Campbelltown project. The focus at the hearing was on an alleged misrepresentation about the deposit (dealt with above). Beyond that, I am not satisfied that Mr Mudaliar relied on any representation about how the equity and loan money would be raised and applied, or how expenses were being met in the meantime.

(d) The evidence established that the initial plans were for the company to construct 99 units on the Property with construction commencing in November 2015 to February 2016 — this was accurate based on the facts at the time.

(e) As discussed, on the facts Mr Mudaliar's investment was to be used as a contribution to the purchase price of the Property, because this is one of the characteristics of a deposit.

(f) The final representation is significant. It was that Mr Mudaliar and Mr Sharma would be equal partners in the development and would equally share in Mr Sharma's share of the net profit from the development. There is no evidence to suggest this was not an accurate intention based on the facts at the time, recognising that the equal partner status was not direct, but rather via Mr Sharma's profit distribution entitlement in the company.

[73] The evidence also raised issues of whether Mr Sharma withheld information or made misrepresentations about problems with the Campbelltown project after the investment payment was made, particularly during 2016. There is no pleading that any separate identifiable damage was sustained as a result.[51] In this case, the plaintiff takes the position that the funds would not have been advanced at all, but for the

[51] Rather, this was said to be relevant to witness credibility.

misrepresentations. As a matter of timing, this must relate to representations before the funds were advanced.

[74] Overall, both Mr Sharma and Mr Mudaliar made speculative investments in a highly leveraged project, hoping for large returns that failed to eventuate. They did not protect themselves with appropriate contractual arrangements with their co-investors to allocate responsibilities and share losses in the event of failure. While the Court in equity can provide constructive trust remedies based on an assumed common intention in some circumstances,[52] in this case there is no interest remaining in the Property against which the payments can be recovered or a resulting trust could be imposed.[53] Furthermore, Mr Mudaliar never had any basis for expecting a proprietary interest in the Property. The intended purpose of his investment was to share (via Mr Sharma) in the future profit distributions from the land-owning company, following completion of the development and sale of the units.

[75] In terms of the pleaded contract and tort claims, I am not satisfied on the balance of probabilities that there was any express or implied representation that the deposit had already been paid. Nor do I accept that there were circumstances constituting silence as a misrepresentation. There is no evidence to establish that Mr Sharma was aware that Mr Mudaliar was making any such assumption at the time he made his payment. To the contrary, Mr Mudaliar's decision to make his payment into the real estate agent's trust account is consistent with him constructively knowing or suspecting that it was being used for the deposit (even if not expressly told so, as Mr Sharma contends).

[76] My assessment is that it was not reasonable for Mr Mudaliar to rely on this assumption without making any inquiries, and at least confirming the position expressly, particularly when he knew the purchaser was a separate corporate entity with whom he had no direct relationship. In the circumstances, I see no policy reason for imposing a duty of care, and in any event, I have found that there were no misrepresentations reasonably relied on that were causative of the loss.

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52 *Lankow v Rose* [1995] 1 NZLR 277 (CA) at 294, recently considered in *Bary v AB Contracting Nelson Ltd* [2024] NZHC 711 at [141]–[146].

53 See [42] above.

[77] Mr Sharma was not engaged to act as Mr Mudaliar's legal adviser for the investment (this would have been a conflict), so I do not consider that his status as a struck off lawyer significantly changes the analysis. Contrary to Mr Sharma's evidence that he expressly told Mr Mudaliar on 2 March 2015, Mr Mudaliar said that he learnt from another friend shortly after making the investment that Mr Sharma had been having disciplinary problems with the New Zealand Law Society, but that he first learnt Mr Mudaliar has been struck off in early 2016 after doing online research. The nature of the disciplinary problems were readily discoverable at the time, with those events covered by news articles on mainstream online websites (without any name suppression). Given the public nature of those events, I find it more credible that Mr Sharma did discuss his problems with his friend as the context for why Mr Sharma was moving into property investment and the law firm name change. Even if Mr Mudaliar was vague on the details but they mattered to him, he could have found all he needed to know from an online search. The fact that Mr Mudaliar did not take that step in 2015 and remained committed to the project in 2016 after knowing the facts, suggests that Mr Sharma's status as a lawyer was neither relied on for the investment decision, nor causative of loss.[54] No fraud is alleged in this proceeding.

[78] Mr Mudaliar's problems arose not because he paid the deposit as such, but from his failure to document terms as between him and the other investors if completion did not occur and the deposit was forfeited, or indeed if other costs, risks, and liabilities during the construction project might lead to the company's insolvency. It would not particularly make any difference if the other investors had already paid the deposit, but Mr Mudaliar's funds were lost because of expenses incurred with the lending brokers, GJ Building & Contracting Pty Ltd and borrowing costs in circumstances where the project was not completed successfully. Mr Mudaliar was aware that the investors together intended to contribute only AUD 3 million, whereas the building costs alone for the project were around AUD 30 million. Any lender would have a first-ranking security, so Mr Mudaliar must have appreciated there were significant risks with his equity investment.

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[54] See [39] above.

[79] Without any repayment commitment (e.g., loan relationship) or indemnity from Mr Sharma, Mr Mudaliar chose to become a speculative investor taking risks that do not necessarily have any legal remedy upon commercial failure.

[80] Mr Mudaliar's dismay at the loss of his investment is entirely understandable, and he is rightly disappointed that Mr Sharma has not followed through with his statement that "I will ensure that you get your money back, whether it's through the others or my own sources". Nevertheless, Mr Mudaliar has failed to establish any actionable claim against Mr Sharma under s 35 of the CCLA or in negligent misstatement.

Result

[81] I dismiss the claim.

[82] If the parties cannot agree on costs, I direct that the defendant's memorandum on costs is to be filed and served within 10 working days of this judgment, and the plaintiff's is to be filed and served 10 working days later.

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O'Gorman J