

**IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
WHANGĀREI-TERENGA-PARĀOA ROHE**

**CIV-2017-488-62
[2018] NZHC 3170**

BETWEEN

KAREN URLICH, RANDOLPH IVAN
FRANCIS URLICH and BOI TAXATION
TRUSTEE COMPANY LIMITED
Plaintiffs

AND

FAR NORTH DISTRICT COUNCIL
First Defendant

GLOBAL FIBRES LIMITED
Second Defendant

STEPHEN MICHAEL BARCLAY
Third Defendant

Hearing: 29 November 2018

Appearances: J E G San Diego and L A J Gould for the Plaintiffs
No appearance by or for the Defendants

Judgment: 4 December 2018

JUDGMENT OF PALMER J

*This judgment was delivered by me on 4 December 2018 at 3.00p.m.
pursuant to r 11.5 of the High Court Rules 2016.*

Registrar/Deputy Registrar

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Solicitors:
Doug Cowan Barristers & Solicitor, Auckland

Summary

[1] Ms Karen Urlich and Mr Randolph Urlich wanted to build their dream home on the Karikari Peninsula in Northland in 2015. Global Fibre8 Ltd (GF8) sold them a new wall panel system, K3T, and designed plans and specifications for its installation. The product, the plans and the specifications were defective. The Urliches brought proceedings against a number of parties. All defendants settled except GF8, which had taken no steps in the proceeding since their lawyers withdrew in March 2017.

[2] On the basis of the evidence offered by the Urliches in a formal proof hearing, I conclude GF8 was negligent and engaged in misleading and deceptive conduct in supplying the K3T to the Urliches and designing the plans and specifications for its installation in their house. GF8 is liable for \$64,464.04 in special damages for the outstanding amount of the Urliches' loss and \$20,000 in general damages for their distress and inconvenience plus interest and costs.

What happened?

Building a dream home

[3] In 2015, the Urliches started to plan a new home at 245 Tokerau Beach Road on the Karikari Peninsula. Mr Tangi Tuake, the sole director and shareholder of GF8, took them on a factory tour, promoting GF8's pre-fabricated wall panel system, K3T, which was launched in August 2015. He was a compelling host.

[4] Mr Tuake told the Urliches K3T had a Codemark Certificate of Conformity from the Joint Accredited System of Australia and New Zealand. It did. He also told them that meant K3T was a tested and approved building material in New Zealand.¹ It did not. But his advice was consistent with the explanation on GF8's website that the CodeMark Certificate was "a guaranteed acceptance by the regulatory bodies that "demonstrates alignment with mandatory compliance requirements".² It was not. In fact, the Codemark Certificate only purported to establish compliance with the

¹ Affidavit of Karen Urlich of 23 November 2018 at [17].

² At [20] and Exhibit H.

Australian Building Code, and even then required installation subject to a particular installation guide.

[5] Mr Tuake told the Urliches K3T did not burn, did not absorb water and could hold a screw with a 50-kilogram weight.³ The website stated K3T's "key features" are that it is:⁴

Resistant To: Fire, moisture, earthquakes, termites, cyclone and harsh weather.

Environment Friendly: No asbestos, no formaldehyde, no plastimagen, no waste on construction site. Adaptable and flexible for all climates and extra installation.

Cost Effective: It can reduce cost through construction time saving, less trades and less materials. No delays waiting for trades and skilled labour. Reduced handling costs and the number of work tools needed due to innovative system.

Easy Installation: Stylish and cost effective. Scientifically tested at international standards. Customised sizing, lightweight yet durable and load bearing due to composition. High quality finish for internal and external walls.

[6] The Urliches agreed to purchase K3T from GF8. GF8 drafted plans and specifications to fit the K3T boards with minimal waste. The Far North District Council (the Council) granted a building consent. In May 2016, the Urliches engaged Mr Stephen Barclay and SMB Builders to build the house and the work commenced.

[7] In mid-October 2016, the Urliches noticed cracking in the K3T. There were a number of cracks around windows and doors, horizontally along K3T panels, on the vertical joints inside and on plaster applied to the face of the panels. They contacted GF8 and received a response from Mr Tuake in late October. Contact continued between the Urliches and GF8, including two meetings on site. But, on 24 February 2017, Mr Tuake failed to show for a scheduled site visit with the Urliches and the Council inspector. GF8 stopped responding to contact. On 3 March 2017, the Council issued a Notice to Fix defects in the K3T. All building work on site had to stop. GF8 never supplied the information required by the Council.

³ At [18].

⁴ At Exhibit H.

[8] In an interview with TVNZ's 1NEWS, broadcast in May 2018, Mr Tuake continued to claim: K3T does not expand or contract; K3T can hold the pressure of 95 tonnes; K3T meets the New Zealand Building Code; and any lack of compliance with the Building Code can be discredited by the CodeMark Certificate.

[9] The CodeMark Certificate for K3T expired in July 2018 and has not been renewed. The Commerce Commission has been investigating GF8 but has not yet issued its decision.

[10] The Urliches obtained a new building consent and engaged another builder to rebuild the house. The Council confirmed compliance on 8 November 2017. Ms Ulrich gives evidence that she and her husband have been under extreme financial and emotional stress since the Notice to Fix was issued in March 2017.

Defects

[11] Mr Martin Hill, of Veron Building Consultants Ltd, reported to the Urliches in May 2017 on his investigation of the house and K3T concluding, among other things:

- (a) There was widespread cracking as a result of expansion and contraction of the K3T wall panels.
- (b) There was insufficient information available to determine K3T complied with the Building Code.
- (c) To meet the requirements of the Building Code, the K3T panels needed to be stripped and replaced with wall construction that does comply with the Building Code.

[12] Mr Hill has also given an affidavit in the proceeding as an expert building surveyor. His evidence is:

- (a) K3T is not included in the Acceptable Solutions that comply with the Building Code. Neither, in his opinion, do the drawings and the K3T panel system show compliance with the Code as an alternative solution.

He considers “[t]he K3T has insufficient documentation and/or testing to be satisfied that the system will perform in terms of durability and weathertightness to satisfy the requirements of the [Building Code]”.⁵

- (b) He engaged Mr Matthew Keesing of Grayson Wagner Co Ltd to test K3T. Mr Keesing agreed K3T does not satisfy the requirements for any Acceptable Solutions of the Code. In that case, verification methods can be used to demonstrate conformance with cls B1 (Structure), B2 (Durability) or E2 (External Moisture) of the Code. But, in Mr Hill’s opinion, there is insufficient information to determine it does and K3T “is not fit to be marketed and sold to consumers, let alone consented to by the Council”.⁶

- (c) Mr Hill points out the CodeMark Certificate only established compliance with the Building Code of Australia. While the Australian and New Zealand Buildings Codes are similar they are “non-equivalent”, so satisfying one does not automatically satisfy the requirements for the other. Further, the CodeMark Certificate was contingent on use of a particular installation guide. That guide was not the one approved by the Council for use on the Urliches’ house. The two guides described the composition of K3T boards materially differently: the document mentioned in the CodeMark Certificate states the board composition is comprised of “fibrous cement with fibreglass mesh, heavy-duty two pot glue and stainless-steel staples” while the later version states the board composition is “high quality magnesium oxide board with fibreglass mesh, heavy duty two pot glue and stainless steel staples”.⁷

- (d) Mr Hill agrees with Mr Keesing the documentation approved by the Council provides insufficient panel-jointing instructions and lack of

⁵ Affidavit of Martin Hill of 23 November 2018, at [26].

⁶ At [32]–[33].

detailing to show acceptable dimensions or inclusion of movement and control joints.⁸ He considers cracking was inevitable.⁹

- (e) The drawing showed the exterior face of the K3T board terminating flush with the face of the concrete floor slab, without a drip edge, raising moisture concerns.¹⁰
- (f) Mr Hill also engaged Mr Keesing to assess the composition of what appeared to be two different sorts of panel used on the Urlich's house as "K3T". The panels arrived with no identifying labelling and there was no confirmation they were actually K3T. Further, there were two different types of panels delivered and used, with "distinctly different colours".¹¹ The analysis confirmed the samples consisted of two different types of panels. Both consisted of magnesium oxide/magnesium chloride sheets filled with wood fibres, consistent with the generic description of K3T, but the two sorts of panel differed in composition, density and porosity and were likely to perform differently.¹²
- (g) Mr Hill says magnesium oxide boards have been demonstrated to cause corrosion problems in buildings when used in permanent formwork for concrete wall overseas.¹³ In December 2017, Grayson Wagner reported the heavy corrosion of steel reinforcement within the K3T formwork at the Urlich's house was consistent with the presence of chloride.¹⁴ In essence, Mr Hill's evidence is the concrete structure had been "poisoned" by chlorides in the K3T panels and K3T is not suitable for formwork purposes.¹⁵ He also states "the workmanship in forming the bond beams and columns is of an inferior standard that would have led

⁸ At [39].

⁹ At [40].

¹⁰ At [42]–[44].

¹¹ At [49].

¹² At [53]–[55].

¹³ At [67].

¹⁴ At [69].

¹⁵ At [70]–[71].

to structural failure independent of the ‘poisoning’ by the K3T panels”.¹⁶

- (h) Mr Hill considered the only viable remedy was to replace the K3T panels with new wall framing and an exterior cladding system compliant with the New Zealand Building Code.¹⁷

The proceeding

[13] On 2 June 2017, the Urliches, together with the trustee company of the Urliches’ family trust, sued the Council as first defendant, GF8 as second defendant and the builder Mr Stephen Barclay as third defendant. The plaintiffs subsequently joined SMB Builders as fourth defendant. The Council joined OBD Consultants Ltd, a consulting engineering company, as a third party.

[14] Mr Tuake was personally served with the documents commencing the proceeding against GF8. By memorandum filed on 5 October 2017 Mr Timothy Gunn of Shine Lawyers Ltd (Shine), representing GF8, stated counsel for the plaintiff had agreed GF8 would file a statement of defence before the first case management conference. Mr Gunn attended the case management conference on 18 October 2017 and another of 5 February 2018.

[15] By memorandum of 7 December 2017, counsel for the plaintiff advised GF8 had filed a statement of defence on 16 October 2017. The plaintiffs’ submissions repeated that. However, it turns out that was not correct. Mr Gunn did send an email to counsel for the plaintiffs and the Court Registry on 16 October 2017 saying “Please find enclosed by way of service the Second Defendants statement of defence”. But Mr Gunn now confirms in a memorandum to the Court of 30 November 2018 that a letter enclosing the statement of defence and the filing fee was never sent to the High Court Registry for filing due to “administrative oversight”. Regardless of the reason, there is no record of any filing fee having been paid or of the court receiving a hard

¹⁶ At [72].

¹⁷ At [73].

copy as required by the High Court Rules 2016 in order to be filed.¹⁸ A statement of defence may have been served, but no statement of defence was filed.

[16] On 8 March 2018, Shine Lawyers Ltd applied to withdraw as counsel for GF8 because “circumstances have arisen that prevent the firm from acting”. Mr Gunn swore an affidavit saying he had personally ensured Mr Tuake had been made aware of the effect of any withdrawal and he provided a new address for service, the office of the GF8, in Papakura, Auckland. The other parties consented to the application. On 26 March 2018, Toogood J made an order accordingly, directing Mr Gunn to serve a copy of his minute on GF8. He also noted GF8 was in breach of its discovery obligations.

[17] At the next case management conference on 1 May 2018, counsel for the plaintiffs reported Mr Tuake had not responded to emails. Associate Judge Bell directed Shine Lawyers Ltd to forward his minute, warning of the consequences of failure to comply with discovery obligations, to GF8. But GF8 has taken no steps in the proceeding since Shine Lawyers Ltd ceased to act.

[18] In September 2018, at a settlement conference, a conditional settlement was reached between the Urliches, the other defendants and the third party. GF8 did not appear. The settlement went unconditional in October 2018. The Urliches wished to continue to pursue their claim against GF8 by default. On 1 November 2018, Associate Judge Bell set down a hearing by formal proof.

[19] Under r 15.9 of the High Court Rules 2016, if a defendant does not file a statement of defence the plaintiff may seek judgment by formal proof. The plaintiffs have filed evidence and seek judgment. They believe GF8 should have been a central party to the proceeding.

Was GF8 negligent?

[20] The common law of tort imposes liability for negligence on those who breach a duty of care owed to others, causing loss. In deciding whether a duty of care is owed,

¹⁸ High Court Rules 2016, rr 1.3 and 5.47; Schedule to the High Court Fees Regulations 2013, item 10(b).

the relationship between the parties is relevant, particularly: whether there is a prima facie duty because the loss was reasonably foreseeable and whether there is sufficient proximity in the relationship; and whether it is fair, just and reasonable to impose a duty of care.¹⁹ Contractual documentation can be relevant to whether there is a prima facie duty, but is not determinative.²⁰

[21] Here, there is a direct relationship between GF8 as manufacturer and supplier and the Urliches as consumer. Their relationship was sufficiently proximate, and the loss was sufficiently foreseeable to impose a duty of care on GF8. I also consider that is fair, just and reasonable in the circumstances. There is no evidence before me of anything in the nature of contractual arrangement between the Urliches and GF8 that suggests otherwise.

[22] I consider it is clear GF8 breached its duty of care, both in supplying K3T to the Urliches and in designing the plans and specifications for the Urliches' house. K3T was a defective product and did not comply with the New Zealand Building Code. GF8's design of the Urliches' house was defective. GF8 did not exercise reasonable skill and care in discharging either its supply or design responsibilities. That is clear from the expert evidence of the defects outlined above. GF8 is liable in negligence.

Did GF8 engage in misleading and deceptive conduct?

[23] Section 9 of the Fair Trading Act 1986 (FTA) states “[n]o person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”. The test for misleading or deceptive conduct is whether the reasonable person, in the claimant's situation would have been likely to have been misled or deceived.²¹ Intention to mislead is not required. Where a claimant was actually misled or deceived and the defendant's conduct in breach of s 9 was, practically, an effective cause of the claimant's loss, the court can make orders under s 43 to pay the amount of loss.²²

¹⁹ *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 [*The Grange*] at [149]-[161]; *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*] at [220]; *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78.

²⁰ *Carter Holt Harvey Ltd v Minister of Education*, above n 19 at [26].

²¹ *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [28] and footnote 13; *Houghton v Saunders* [2018] NZSC 74, (2018) 15 TCLR 1 at [323].

²² At [29].

[24] Here, I am satisfied on the basis of the evidence before me that GF8 was in trade and engaged in misleading and deceptive conduct in its characterisation of the qualities of K3T and the status of the Codemark Certificate in complying with New Zealand regulatory requirements. There is no dispute about what was said or its meaning. GF8 was well aware it was talking directly to potential customers. The reasonable customer would have been likely to have been misled and deceived. The Urliches were actually misled and deceived. That was clearly an effective cause of their loss. GF8 is liable under the FTA.

Quantum of damages

[25] The purpose of damages in tort law is to put the party whose rights have been violated in the same position, so far as money can, as if her or his rights had been observed. The quantum of compensatory damages is calculated on the same basis for claims in negligence claim and under s 43 of the FTA. I accept it is appropriate here to award damages reflecting the “cost of cure”.²³

[26] Ms Heidi van Eeden, of Veron Building Consultants Ltd, has sworn an affidavit as an independent expert quantity surveyor.²⁴ She has reviewed the costs expended by the plaintiffs in removing and replacing the K3T Wall Panel System in 2017 and 2018. In her opinion, the reasonable cost of that is \$419,464.04. I can see no reason to disagree with her analysis or conclusion.

[27] Accordingly, the Urliches seek, as special damages from GF8, \$419,464.04 less the compensation they have received in settlement from other parties to the proceeding. That results in a claim against GF8 of \$64,464.04. I award that amount as special damages.

[28] The Urliches also seek \$30,000 in general damages for their non-pecuniary loss in terms of the significant distress and convenience this matter has caused them. I consider this is a little high, compared with the range of comparable cases.²⁵ Taking

²³ *Western Park Village Ltd v Baho* [2014] NZCA 630, (2014) 16 NZCPR 139 at [63].

²⁴ Affidavit of Heidi van Eeren of 23 November 2018.

²⁵ *O’Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 445 at [127]–[129]); *Grant v Ridgway Empire Ltd* [2018] NZHC 2642.

into account the time over which the Urliches have been precluded from living in their home, I award general damages of \$20,000.

[29] The Urliches are entitled to interest under s 87 of the Judicature Act 1908 from the date the statement of claim was filed until the date of judgment.

Result

[30] I order Global Fibre8 Ltd to pay the plaintiffs:

- (a) \$64,464.04 in special damages;
- (b) \$20,000 in general damages;
- (c) interest on the total amount of damages of \$84,464.04 from 2 June 2016 to the date of this judgment; and
- (d) costs on a 2B basis and reasonable disbursements.

Palmer J