

**IN THE DISTRICT COURT  
AT PALMERSTON NORTH**

**I TE KŌTI-Ā-ROHE  
KI TE PAPAIOEA**

**CIV-2019-054-000622  
[2020] NZDC 16272**

BETWEEN

ROGER SAINTY  
MARGARET SAINTY  
Plaintiffs

AND

PROPERTY BROKERS LIMITED  
Defendant

Hearing: 25 May 2020

Appearances: J Pietras for the Plaintiffs  
N J Cannon for the Defendant

Judgment: 19 August 2020

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**RESERVED DECISION OF JUDGE L C ROWE  
[On application for summary judgment]**

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[1] Roger and Margaret Sainty were the owners of 129 Simmons Road, Taumarunui.

[2] Mr and Mrs Sainty bought the property in March 2004 as an investment. They owned two other investment properties in Taumarunui at the same time.

[3] Because the Saintys lived in Lower Hutt, they entered a property management agreement with Century 21 Countrywide Limited to oversee management and tenancing of the Taumarunui properties.

[4] In February 2015, Property Brokers Limited took over Century 21's rental portfolio.

[5] While the Saintys did not enter a separate property management agreement with Property Brokers, both parties proceeded on the basis that Property Brokers had taken over management of the Saintys' three Taumarunui properties, including 129 Simmons Road.

[6] The property was tenanted when Property Brokers took over management, but the tenant moved out towards the end of August 2015.

[7] Property Brokers carried out a pre-tenancy inspection of 129 Simmons Road on 1 September 2015 and reported that there was no damage to the property.

[8] Property Brokers found a new tenant, Rangimarie Woods, who began renting the property from September 2015.

[9] In an email at the time, Property Brokers said they had found new tenants for 129 Simmons Road, describing them as "a lovely couple, who are expecting their first child". They further advised that "they were existing tenants with Property Brokers ... and were very happy to have found your home".

[10] The Saintys say they understood Property Brokers had entered a periodic tenancy with Ms Woods as their agent on the bases that:

- (a) Ms Woods and her partner and first child would be the only tenants;
- (b) The rent would be fixed at \$215 per week.
- (c) Ms Woods would pay a bond equivalent to four weeks rent, being \$860.
- (d) Property Brokers would carry out three monthly inspections of the property.

[11] The Saintys left it for Property Brokers to enter the written tenancy agreement with Ms Woods. Property Brokers did not forward a copy of any agreement to the Saintys at the time.

[12] The tenancy appears to have been uneventful until March 2018, when the Saintys decided to put 129 Simmons Road on the market for sale.

[13] Mr and Mrs Sainty visited the property on 27 March 2018 to carry out minor renovations and discovered the property had been extensively damaged and needed substantial repairs.

[14] Property Brokers then inspected the property and provided a report, detailing the damage.

[15] The Saintys' insurance loss assessor inspected the property on 3 April 2018 and suggested the property may have been contaminated by methamphetamine.

[16] An initial methamphetamine test confirmed methamphetamine contamination above 1.5ug/100cm<sup>2</sup> in the kitchen, toilet/bathroom, laundry, garage and sleepout.

[17] In response to requests from the Saintys, Property Brokers advised that it did not have a copy of the tenancy agreement entered with Ms Woods, although it believed it would have entered one in accordance with its standard practice, Property Brokers had collected \$760 of the bond rather than \$860, and the last inspection Property Brokers had carried out at 129 Simmons Road was on 25 September 2017, six months earlier.

[18] On 20 April 2018, Shannon Bishop, a property manager from Property Brokers, visited 129 Simmons Road and found that more windows had been broken.

[19] Property Brokers issued a 14-day breach notice to Ms Woods,<sup>1</sup> requiring her to replace smoke alarms that had been removed, clean the bathroom and remove the large amount of waste that was scattered about the property.

[20] The Saintys instructed Property Brokers to file an application in the Tenancy Tribunal for termination of the tenancy and for a possession order under ss 55 and 64(3) of the Residential Tenancies Act.

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<sup>1</sup> See Residential Tenancies Act 1986, s 56(1)(b).

[21] Ms Woods stopped paying rent from 15 May 2018 and the Tenancy Tribunal granted a termination order on 22 May 2018. Ms Woods was evicted from 129 Simmons Road by a bailiff on 28 May 2018.

[22] The Saintys arranged for more rigorous methamphetamine testing in late May 2018, which confirmed the presence of methamphetamine at levels of up to 19.28ug/100m<sup>2</sup>.

[23] Property Brokers prepared an application to the Tenancy Tribunal in early June 2018, seeking compensation from Ms Woods for damage to the property but, by then, the relationship between the Saintys and Property Brokers had deteriorated to the point the Saintys terminated Property Brokers' management authority in respect of their three rental properties, including 129 Simmons Road, on 12 June 2018.

[24] The Saintys arranged for repairs and remedial work at 129 Simmons Road between June and October 2018, including methamphetamine decontamination.

[25] The Saintys took over the application against Ms Woods in the Tenancy Tribunal for compensation and were awarded \$15,037.18. They were not, however, awarded all of their costs in relation to methamphetamine testing and decontamination. The Tenancy Tribunal applied standards established in the report released on 29 May 2018 by Professor Sir Peter Gluckman, "*Methamphetamine contamination in residential properties; exposures, risk levels, and interpretation of standards*", which established that a level of 15ug/100cm<sup>2</sup> was unlikely to have an adverse health effect and premises were safe for habitation under that level. This level was achieved reasonably early in the clean-up of 129 Simmons Road.

[26] The Saintys were unable to let the property while it was being repaired. In mid-October 2018, after repairs had been completed, the Saintys placed 129 Simmons Road on the market for an asking price of \$235,000.

[27] The Saintys were required to provide copies of the methamphetamine test results to prospective buyers. Their real estate agent recommended they reduce the

asking price because buyers were being deterred due to the property's contamination history and accordingly, they reduced the asking price to \$223,000.

[28] The Saintys sold 129 Simmons Road on 13 March 2019 for \$224,700, which was \$10,300 less than their original asking price.

### **The Saintys' claim against Property Brokers**

[29] The Saintys say Property Brokers were negligent in the following ways:

- (a) Failing to either enter a tenancy agreement with Ms Woods or keep a copy of the tenancy agreement.
- (b) Failing to collect the full bond.
- (c) Failing to monitor the number of tenants residing at the property. It was apparent in the late March/early April 2018 inspections that more occupants had been living at the address than Ms Woods, her partner and child.
- (d) Causing the Saintys to believe they were entitled to terminate the tenancy on seven days' notice due to methamphetamine contamination. While Property Brokers could not locate a tenancy agreement entered with Ms Woods, they produced a computer-generated agreement they said would have contained clauses entered at the time, including a termination clause for methamphetamine contamination.
- (e) Failing to update the tenancy agreement, if one existed, to ensure that its terms were lawful and enforceable in relation to methamphetamine testing and contamination. After producing the computer-generated agreement, Property Brokers advised the methamphetamine termination clause was unenforceable.
- (f) Failing to inspect 129 Simmons Road in December 2017.

- (g) Failing to serve a 14-day breach notice in respect of damage.
- (h) Failing to inspect the premises after the expiry of the 14-day breach notice.
- (i) Unreasonably delaying filing of an application in the Tenancy Tribunal for termination and possession.
- (j) Amending the Tenancy Tribunal application without the plaintiff's instructions, causing the hearing to be unnecessarily delayed.
- (k) Disclosing the Saintys' personal details on the Tenancy Tribunal application to Ms Woods, placing them at risk of retaliation.
- (l) Failing to organise a professional methamphetamine test within a reasonable timeframe.
- (m) Failing to take appropriate steps to protect the property from further damage.
- (n) Failing to obtain a forwarding address for Ms Woods. The Saintys incurred costs of obtaining a substituted service order as they did not know Ms Woods' whereabouts after she was evicted from the property.

[30] The Saintys also say Property Brokers breached the Fair Trading Act 1986 by making or publishing misrepresentations discussed below, while in trade, and thereby:

- (a) Engaged in conduct that was misleading or deceptive or likely to mislead or deceive – s 9.
- (b) Engaged in conduct that was liable to mislead the Saintys as to the characteristics and suitability of Property Brokers Rental Management Services – s 11.

- (c) Made false or misleading representations that the Rental Management Services were of a high standard of quality and would be administered by well trained and experienced staff – s 13(b).
- (d) Made false or misleading representations concerning the existence of a guarantee that they would meet rental payments while a property they were managing was untenanted – s 13(i).

[31] The Saintys say they have suffered losses due to Property Brokers' negligence or breaches of the Fair Trading Act as follows:

- (a) Ms Woods' rent arrears from 15 May to 25 May from when she stopped paying rent before she was evicted; \$396.43.
- (b) Insurance excess for damage to 129 Simmons Road; \$3,250.
- (c) Loss of rent from 26 May 2018 until 3 November 2018; \$5,635.
- (d) Loss of rent from 4 November 2018 until 28 April 2019; \$6,750.
- (e) A reduced sale price due to the property's contamination history; \$10,300.
- (f) Shortfall on the bond payment; \$100.
- (g) Costs of decontamination and repair not covered by insurance; \$15,359.29.
- (h) Legal costs for the period 6 April 2018 to 30 April 2018; \$2,047.
- (i) Legal costs for the period of 1 May 2018 to 16 June 2018; \$546.25.
- (j) Expenses for instructing an agent to appear at the Tenancy Tribunal hearing; \$402.50.

- (k) A filing fee for the eviction warrant; \$200.
- (l) Legal costs for filing an application for substituted service due to Property Brokers not obtaining a forwarding address for Ms Woods; \$862.50.
- (m) Legal costs for preparing a letter of demand; \$300.

Total claim - \$46,074.25.

### **Principles on summary judgment application and issues**

[32] Mr and Mrs Sainty are entitled to summary judgment if they satisfy the Court that Property Brokers has no reasonable or fairly arguable defence to either or both causes of action on which they rely.<sup>2</sup>

#### *Negligence*

[33] Claims in negligence are generally regarded as unsuitable for summary judgment where a close examination of the facts is required.<sup>3</sup>

[34] Uncontroversially, the parties agree that, for the Saintys to succeed in a claim of negligence, they must establish:

- (a) Property Brokers owed the Saintys a duty of care.
- (b) Property Brokers breached the duty of care.
- (c) The breach of duty of care caused the losses claimed by the Saintys.

[35] While Property Brokers correctly accepts it owed a duty of care to the Saintys, the ambit or scope of that duty is in dispute.

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<sup>2</sup> Rule 12.2(1) and *Pemberton v Chappell* [1987] 1 NZLR 1 at page 3.

<sup>3</sup> *International Marketing Corporation Limited v New Zealand Meat Producers Board* (1994) 9 PRNZ 532; *Economy Services Limited v Smith & Hughes* (1989) 2 NZBLC 103, 582; *Daisley v Whangarei District Council* [2018] NZHC 2211.



[36] To the extent Property Brokers accepts it owed the Saintys a duty of care, it says it did not breach that duty.

[37] Property Brokers says it did not cause the losses suffered by the Saintys and disputes that the losses claimed by the Saintys are established in any event.

[38] The issue is therefore whether any of these defences are reasonably arguable. If they are, then the Saintys' summary judgment claim in negligence must fail.

#### *Fair Trading Act*

[39] As for the Fair Trading Act claims, the Saintys rely on ss 9, 11, 13(b), 13(i) and 43.

[40] There is no question Property Brokers were engaged "in trade" in terms of each of those provisions. The issues that arise are:

- (a) In relation to s 9 – whether Property Brokers' representations amounted to misleading or deceptive conduct.
- (b) In relation to s 11 – whether Property Brokers' representations were liable to mislead the Saintys as to the nature, characteristics, or suitability for the purpose of property maintenance services.
- (c) As for s 13(b) and (i) – whether Property Brokers, when supplying property management services, made false or misleading representations that their services were of a particular kind, standard or supplied by Property Brokers with particular qualifications, skill or with particular characteristics.
- (d) Should the above be established, then, in terms of s 43, whether the Saintys suffered loss or damage due to Property Brokers' representations.

[41] Property Brokers says it is not liable to the Saintys under the Fair Trading Act because:

- (a) None of the representations referred to were misleading, deceptive, or misrepresentations.
- (b) Few if any of the representations applied to the relationship between Property Brokers and the Saintys, as the Saintys learned of these representations after the management relationship had been entered or they did not otherwise apply.
- (c) To the extent the Saintys seek reimbursement of lost rent, the Saintys terminated the management contract with Property Brokers and therefore Property Brokers had no control over whether the Saintys could tenant the property.
- (d) Property Brokers' representations did not cause any of the losses claimed by the Saintys.

[42] If the Saintys are unable to demonstrate that any of the above defences are not reasonably arguable, their application for summary judgment must fail.

### **The negligence claim**

[43] As an initial observation, Mr and Mrs Sainty obviously had a contractual relationship with Property Brokers. The Saintys had entered a property management agreement with Century 21 whose obligations were apparently assigned to Property Brokers in 2015. The terms or implied terms of the contract between the parties have, however, not been pleaded and the Saintys do not rely on breach of contract as a cause of action.

[44] While concurrent liability in contract and tort is now uncontroversial,<sup>4</sup> it is difficult to see what duty of care Property Brokers owed the Saintys over and above the duties they would have owed as implied terms of a property management contract.

[45] This becomes problematic when defining the scope of Property Brokers' duty of care to the Saintys. The Saintys allege that the duty was both general, namely to exercise reasonable care and skill when providing rental management services, but also specific as to the signing and retention of tenancy agreements, collecting bond and rent, carrying out routine inspections and so on.

[46] The alleged breaches are therefore premised on specific failures against which it is difficult to gauge an objective standard of reasonableness. For example, the Saintys allege Property Brokers failed to monitor the number of tenants residing at the property, failed to serve an appropriate 14-day breach notice, failed to organise a professional methamphetamine test within a "reasonable" timeframe and failed to take "appropriate steps" to protect 129 Simmons Road from further damage. So, while some of the breaches alleged by the Saintys are accepted or uncontroversial, others are advanced without a clear and unarguable standard against which those breaches should be measured.

[47] There is no question Property Brokers ought to have retained a copy of the tenancy agreement signed by Ms Woods so that its terms were clear when it became necessary to enforce that agreement. There is no question Property Brokers ought to have received \$860 bond and not the \$760 it did receive on the Saintys' behalf. Whether it was unreasonable for a property manager to have not inspected the property for six months is, however, not beyond reasonable argument.

[48] More problematic, however, is whether Property Brokers' "breaches" caused the Saintys' losses. The following issues arise:

- (a) Apart from some windows broken in April, there is no evidence of when the property was damaged. Without knowing this, it cannot be said that Property Brokers' "failure" to inspect the property in

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<sup>4</sup> *Riddell v Porteous* [1999] 1 NZLR 1 at [9].

December 2017 or January 2018 had any bearing on the damage caused.

- (b) There is no evidence 129 Simmons Road was being occupied by anyone who presented a risk of damaging the property prior to the damage first being noticed. While the Saintys have obtained evidence that the police attended the address on several occasions during the tenancy, there is insufficient evidence of what prompted the police visits, whether the police attendances indicated a heightened risk of damage or whether Property Brokers ought to have been aware of police attendances.
- (c) While the property was found to have methamphetamine contamination, there is insufficient evidence of when the contamination occurred. Without a methamphetamine test having been conducted at the beginning of Ms Woods' tenancy, it is at least arguable that methamphetamine contamination occurred prior to Ms Woods' tenancy that was either responsible for the methamphetamine levels found or contributed to those levels. It can also not be concluded that Property Brokers ought to have been aware of methamphetamine use on the property on the present state of the evidence.
- (d) Whether Property Brokers ought to have served a more comprehensive 14-day notice, filed a more acceptable application with the Tenancy Tribunal, or complied with the Saintys' instructions about the content of the application does not establish that any greater loss has been suffered by the Saintys due to any delay this caused or any defect in documentation provided by Property Brokers to Ms Woods. On the present state of the evidence, some windows may have been broken during this period, but there were no grounds to immediately terminate Ms Woods' tenancy. If a delay of up to a month was caused, the evidence does not establish that further damage was caused within that month.

- (e) While it is accepted Property Brokers ought to have secured or retained a written tenancy agreement, the Saintys were able to obtain remedies against Ms Woods under the Residential Tenancies Act such as eviction and an order for compensation. There is no demonstrable link between the lack of a tenancy agreement and any damage caused or loss suffered.
- (f) The loss of rent was due to the Saintys obtaining an order terminating Ms Woods' tenancy, repairing the property and then preparing it for sale. There is insufficient evidence that Property Brokers caused this loss.
- (g) The same applies to legal costs, eviction costs and the costs of obtaining an order for substituted service. Ms Woods did not leave the property willingly and had to be evicted by a bailiff. In those circumstances, it is difficult to conclude that Property Brokers ought to have obtained a forwarding address.
- (h) Expenses for instructing an agent to appear at the Tenancy Tribunal hearing arose because the management contract was terminated by the Saintys. Clearly the Saintys were dissatisfied with Property Brokers' performance. If Property Brokers is liable for any loss arising from the termination of the management contract, then it is more appropriately assessed on a contractual footing rather than a tortious one.
- (i) The claimed shortfall in the sale price of 129 Simmons Road is not a loss which can be clearly sheeted home to Property Brokers on the current state of the evidence. At present, the Saintys have established only that they did not achieve their asking price when selling the property. They have provided no evidence of the value of the property or whether the price achieved was less than what was expected in the Taumarunui market at the time. If the price was affected by the methamphetamine contamination history of the property, the

methamphetamine contamination is again not something that can be clearly sheeted home against Property Brokers on the current evidence.

[49] It also cannot be said the Saintys have unarguably suffered all losses they claim. For example, the Saintys claim an insurance excess with no details of what repairs were carried out by or under the supervision of the insurance company. They also claim for uninsured repairs and replacement of carpet with no explanation of why those repairs were not covered by insurance and insufficient information about the extent to which repairs related to damage caused by the tenants as opposed to wear-and-tear or preparation of the property for sale. It might be these claims could be made out on further evidence and scrutiny, but the information presently provided is insufficient for summary judgment to be awarded.

[50] The only loss suffered by the Saintys for which Property Brokers is unarguably liable is Property Brokers' failure to collect the full amount of the bond. Property Brokers had a duty to collect it, failed to do so (or tell the Saintys they had not collected the full amount) and were responsible for the Saintys unable to have recourse to the full amount of the bond when they obtained a compensation order from the Tenancy Tribunal. I decline to enter judgment at this stage in favour of the Saintys for the \$100 shortfall because the amount is de minimis. I expect, however, that Property Brokers will immediately pay this shortfall to the Saintys, if they have not already done so. If this amount is not immediately paid then I will consider an application to enter judgment for this amount.

### **Fair Trading Act claim**

[51] The Saintys characterise the representations made by Property Brokers as "initial representations, quality representations, guarantee representations and tenant representations".

#### *Initial representations*

[52] The initial representations arise from an introductory letter Property Brokers sent to the Saintys on 31 December 2014, shortly before they took over the property management portfolio from Century 21. In that letter, Property Brokers said:

Property Brokers provides a quality management service to you. Using the most up to date technology and methods available to the industry today, we would like to welcome you as a client of our company and introduce a range of new services available under your current arrangements.

[53] The letter attached a landlord satisfaction survey summarised in a series of graphs suggesting there had been reasonably high satisfaction rates with the performance of the Property Brokers' tenancy management service.

[54] There is no doubt Property Brokers made these representations to encourage the Saintys to use their property management service after the transition from Century 21.

[55] Whether Property Brokers' service fell below the standards represented in their letter is, however, difficult to gauge on the present evidence. What a "quality management service" and "up to date technology and methods" actually comprise is not clearly explained in the evidence to a point it could be said these were unarguably misrepresentations on Property Brokers' part.

#### *Quality representations*

[56] The quality representations arise from information published on the Property Brokers' website, where they say, amongst other things:

As a one stop shop for all your property needs, Property Brokers will take care of all aspects of property management.

We ensure that your portfolio is well maintained throughout the course of our management, whilst at the same time your investment is maximising its financial return. We also offer essential advice into how you can add value to your investment portfolio, maximising rent returns and improving yield.

We will remove the stress of dealing with the difficult issues residential property investment can deliver. We will also give regular updates and 24-hour access to your portfolio through our owner online access service.

[57] The website goes on to describe Property Brokers as having experience in residential property management, a strict tenant selection process based on their "unique tenant selection criteria", and advanced software to enable clients to access rental statements online.

[58] As for property inspections, the website says:

Property Brokers has invested in modern technology to bring you the most up to date and detailed property inspection reports. We inspect your property every three to four months and by the next working day you will have been forwarded a detailed inspection with photographs and recommendations. All your inspections will be available to view on our owner online access service.

[59] The management fee charged by Property Brokers is stated on their website to include:

- Accompanying prospective tenants through the property by appointment only.
- Screening of all tenant applications, including reference and credit checks were necessary.
- Completely tenancy agreements and lodging bonds with the Department of Building and Housing.
- Issuing appropriate notices of breach under the Residential Tenancies Act where applicable.
- At conclusion and commencement of tenancies, full detailed property inspection with photographs.
- Representation at Tenancy Tribunal and mediation for any breaches under the Residential Tenancies Act.

[60] The information from the website concludes with positive testimonials about Property Brokers' property management service.

[61] Property Brokers says these representations do not apply to their relationship with the Saintys because the Saintys did not enter the property management relationship in reliance on these representations. The Saintys saw the representations on Property Brokers' website after the management relationship began. The management relationship with Property Brokers was however terminable at will. If



the Saintys read the online representations during their property management relationship with Property Brokers, then the representations could reasonably have induced them to remain with Property Brokers. The representations themselves can certainly be read in that way.

[62] Property Brokers did not fulfil some of their online representations, including:

- (a) Retaining a copy of the tenancy agreement.
- (b) Conducting three or four monthly inspections.
- (c) Collecting the full amount of the bond.

[63] Otherwise it is at least reasonably arguable that Property Brokers did what they represented they would do.

[64] It is also reasonably arguable that the Saintys' losses were not due to a failure by Property Brokers to meet the standards represented by them in their online advertising, with the obvious exception of their failure to collect all of the bond.

[65] I also observe that many of the representations in Property Brokers' online material could arguably establish implied terms of the management contract between the Saintys and Property Brokers, which again may be a better lens to view the relationship between the parties and potential liability.

#### *Guarantee representations*

[66] The guarantee representations arise from further online material headed "Service Guarantees" in which Property Brokers represent:

- (a) That their rent collection process is such that they guarantee to pay the rent if the tenant will not.
- (b) If a client is not happy with their service, Property Brokers will pay the management fee.

- (c) If the property becomes untenanted and Property Brokers do not sign up a tenant within 28 days of it being available, Property Brokers will pay the rent.

[67] The service guarantee statements are set out on a single page annexed as exhibit “G” in Margaret Sainty’s affidavit. The page however also refers to “full terms and conditions” which have not been produced. I am therefore unable to discern the parameters of these guarantees and the circumstances in which they would apply.

[68] If there was an obligation on Property Brokers to re-tenant the property after Ms Woods was evicted, this obligation ended when the Saintys cancelled the management arrangement on 12 June 2018.

[69] There is insufficient evidence on which summary judgment could be available based on the “guarantee representations”.

*Tenant representations*

The tenant representations consist of Property Brokers writing to the Saintys at the beginning of Ms Woods’ tenancy and during the tenancy, saying that Ms Woods and her partner were:

- (a) A “lovely couple who are expecting their first child ... and are existing tenants ... who are great and are very happy to have found your property”;
- (b) “A good tenant”;
- (c) “A low maintenance tenant”;
- (d) “good for many years”.

[70] The Saintys say they relied on these representations to continue their tenancy with Ms Woods.

[71] There is however insufficient evidence to conclude these were inaccurate representations until the property was found to be damaged in late March 2018. By then, Ms Woods had been occupying the property for approximately two and a half years and had apparently occupied another property managed by Property Brokers for some months prior to that, without incident. The two or three inspections Property Brokers carried out, including on 25 September 2017, recorded no damage. The Saintys may also have visited the address during the tenancy, or had contractors do so, for example to install insulation, without any concerns being raised.

[72] The Saintys later discovered the police had been called to the property on several occasions and other people may have been staying at the address who were not permitted, but the nature of the police callouts, and when other people were occupying the property are not clearly established.

[73] Clearly, at some stage, Ms Woods performance as a tenant did not match the descriptions used by Property Brokers. At the time the representations were made however, there is insufficient evidence that Property Brokers' assessment of Ms Woods was not accurate.

## **Outcome**

[74] It follows from the above analysis that it is reasonably arguable:

- (a) Property Brokers' duty of care to the Saintys ought not be cast as widely as contended by the Saintys.
- (b) Property Brokers did not breach its duty of care apart from noted exceptions, such as failing to retain a signed tenancy agreement and failing to collect the full amount of bond.
- (c) Property Brokers did not cause the losses claimed by the Saintys, apart from the shortfall with the bond payment.
- (d) The Saintys' losses are not necessarily claimable or related to the damage caused by the tenant.

- (e) Not all of the representations relied on by the Saintys can be characterised as untrue, misleading or misrepresentations in terms of ss 9, 11 and 13 of the Fair Trading Act. Where the representations could be characterised as misleading or misrepresentations, they did not lead to any of the losses claimed by the Saintys, except for the shortfall with bond.

[75] For these reasons, the summary judgment application is dismissed.

### **Directions and costs**

[76] In accordance with r 12.12(1), I direct that this matter be called in the Palmerston North civil list on 4 September 2020 at 10.00 am to fix the mode of trial and give directions as to the future conduct of the proceeding, including identifying any pre-trial issues.

[77] On the material filed to date, the matter seems capable of being resolved in a simplified trial, but this may depend on whether expert evidence is to be given in relation to any of the matters raised by either party. This proceeding also seems suitable for a judicial settlement conference.

[78] The general rule is that costs should be reserved pending final resolution,<sup>5</sup> but the defendant, which has been largely successful, refers to *Calderbank* correspondence. If costs are sought then memoranda are to be filed and exchanged by 1 September, with the issue to be addressed at the 4 September callover. Counsel should try to resolve the question of costs between them in the meantime.

L C Rowe  
District Court Judge

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<sup>5</sup> *NZI Bank Limited v Philpott* [1990] 2 NZLR 403.