

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

CIV 2006-404-007004

BETWEEN SG LOCKWOOD AND WADHAM
 GOODMAN TRUSTEES LIMITED AS
 TRUSTEES OF THE ISLAND TRUST
 Plaintiffs

AND BOSTIK NEW ZEALAND LIMITED
 Defendant

Hearing: 16-18, 24-27, 31 March 2-4, 11, 17 April 2009

Appearances: L McEntegart and I Hikaka for Plaintiffs
 A Challis and R Scott for Defendant

Judgment: 3 June 2009 at 12:45pm

(RESERVED) JUDGMENT OF ANDREWS J

*This judgment is delivered by me on 3 June 2009 at 12:45pm
pursuant to r 11.5 of the High Court Rules.*

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Registrar / Deputy Registrar

Solicitors:
Lee Salmon Long, PO Box 2026, Auckland 1140 (Plaintiffs)
McElroys, PO Box 835, Shortland Street Auckland 1140 (Defendant)
Counsel:
L McEntegart, PO Box 1417, Shortland Street, Auckland 1140 fax 357-0143

Introduction

[1] The plaintiffs (the Trustees) are the owners of a large house built on three levels (the house) on Motukiekie Island in the Bay of Islands (the Island). A large tiled deck (the deck) surrounds the main (middle) level. The tiles are laid over a fibre cement sheet substrate with a waterproofing membrane, Bostik Ultraseal, supplied by the defendant (Bostik), applied between the substrate and the tiles.

[2] In August 2002, during substantial rainfall, water leaked through part of the deck into the main entry area to the house below it. That part of the deck was repaired. However, there were further leaks through the deck in 2003 and 2004, culminating in the collapse of the ceilings of rooms underneath the deck in mid-2004.

[3] All tiles on the deck were then lifted, a different waterproofing product was applied, and new tiles were laid.

[4] The Trustees claim against Bostik for the cost of replacing the tiles and waterproofing membrane. They allege that Bostik negligently misrepresented that Bostik Ultraseal was the best product and was suitable and appropriate for use as a waterproofing membrane for the deck. Bostik denies any liability. It says, further, that the Trustees' claim is statute-barred, that exclusion clauses apply, that the Trustees have suffered no loss as they did not purchase the property until July 2004, and that the Trustees were contributorily negligent.

Factual background

[5] In large measure the dispute between the parties is factual. It is, therefore, necessary to refer to the evidence in some detail, and to make findings on disputed matters.

Purchase by the Trust

[6] The house is the only residence on Motukiekie Island. It is on three levels. The lowest level has the front entrance to the house, a Caretaker's flat, and storage

areas. The middle level has the main living areas and master bedroom suite. The upper level has bedroom accommodation. The deck surrounding the main level is large, about 200 square metres. As noted earlier, the deck has a substrate of fibre cement sheets, covered by a waterproof membrane, over which tiles have been laid. In part the deck provides the roof for the entrance and flat below, and in part it extends out beyond those areas.

[7] Mr Stephen Lockwood entered into an agreement on 16 November 2001 to buy the Island from the former owner, Mr Clark. He subsequently nominated S G Lockwood Developments Ltd (Lockwood Developments) as purchaser. The sale settled on 14 December 2001. Mr Stephen Lockwood is the sole director of Lockwood Developments. In 2004 he undertook a restructuring of the way he organised his affairs. As part of this restructuring, the house was sold by Lockwood Developments to himself and Wadham Goodman Trustees Limited, as trustees of the Island Trust.

[8] On 10 November 2006, by deed, Lockwood Developments assigned its causes of action against Bostik to Mr Lockwood and Wadham Goodman Trustees Limited, as trustees of the Island Trust.

[9] The house has been, and is, used as a holiday home for Mr Lockwood and his family.

Engagement of Mr Iversen for tiling work

[10] At the time Mr Lockwood entered into the purchase agreement, Mr Clark was engaged in the construction of the house. Construction had begun in mid-2001. Mr Jeffrey Iversen was engaged by Mr Clark in May 2001 to carry out internal and external tiling, and stone cladding on the walls of the house.

[11] Mr Iversen said that, when he was preparing a quote for the cladding and tiling work, Mr Clark said he wanted “an integrated waterproofing system”, which involved the first layer of waterproofing being taken over door and window sills and 150 to 200 millimetres up walls and other vertical surfaces that meet the deck. This

process is known as “tanking”. The doors and windows are then fitted, prior to a second waterproofing layer being applied and the area being tiled. Mr Iversen was happy to apply the waterproofing layers in this manner.

[12] Mr Iversen placed an order for a product Flexicoat, which he intended to use both for the internal and external tiling, and for the stonework.

Meeting Mr Iversen / Mr Reid / Mr Marusich in May-July 2001

[13] Mr Iversen said that in the period May to July 2001 he was visited by two representatives of Bostik, Mr Grant Reid and Mr Peter Marusich. Mr Iversen had known both for some years, and understood that they were keen to talk to tilers about Bostik’s Ultraseal products.

[14] Mr Reid described “Ultraseal” as a liquid applied polyurethane product which dried to form a waterproof but flexible membrane, onto which the tiles are affixed. Mr Bernard Rule, the Managing Director of Bostik New Zealand, said that the product was introduced by Bostik Australia in 1996 as “Ultraset”, then in 1997 its viscosity was reduced and the name changed to Ultraseal. Ultraseal was first sold in New Zealand in 1998.

[15] In about 2000 Bostik brought out a product “Ultraseal Rollable” (UltrasealR) intended for use on larger areas. Mr Reid said this was Ultraseal with a small amount more solvent mixed in, to make it easier to apply by roller. Notwithstanding the different names of Ultraseal and UltrasealR, Bostik witnesses referred generally to Ultraseal, on the basis that “Ultraseal is Ultraseal”. It is relevant to note at this point that in early 2005 Bostik introduced “Ultraseal LV” (low viscosity), which was formulated for application by roller on large exterior level decks and podium areas, where a thinner, easier to apply coating was required.

[16] In early 2001 both Mr Reid and Mr Marusich were employed in promoting and providing technical backup for Bostik building products (Mr Reid as a Construction Products Manager and Mr Marusich as a Sales Representative). Neither is currently employed by Bostik. Mr Reid said he was at that time talking

“on a daily basis” with builders, architects, and tilers about using Ultraseal. Mr Marusich said that at that time he was talking to up to eight different people a day about Ultraseal.

[17] Mr Iversen said that Mr Reid and Mr Marusich visited him at the site of a tiling job he was engaged in, at Remuera. This job was for a friend, he said, so he was able to invite Mr Reid and Mr Marusich to visit him there. He said that they showed him a “jar experiment” which comprised a jar that had water in it, covered with cardboard sealed with Ultraseal. The jar could be turned upside down with no water penetrating through the cardboard.

[18] Mr Iversen said that Mr Reid and Mr Marusich also talked to him about the elasticity of Ultraseal, and showed him a sample of it that had been allowed to cure. He said the sample flexed more and had greater elasticity than he had previously seen with waterproofing products. Mr Iversen said he was intrigued and interested in finding out more about the product.

[19] Mr Iversen also said that Mr Reid and Mr Marusich asked him about the range of work he did. In responding he referred to the job on the Island, which he had just secured. He said he had the plans with him, and showed them to Mr Reid and Mr Marusich, and talked about the “tanking” system to be used. He said he always carried the plans for his current contracts with him in his panel van, so that they would be available for him to refer to in the event that he received calls about them. On the occasion of his discussion with Mr Reid and Mr Marusich, he said, he spread the plans out on the bonnet of the van. Mr Reid worked out a rough volume calculation and cost for the job.

[20] Mr Iversen said he was then provided with a sample tube (or “sausage”) of Ultraseal which he tested on a small area of the bathroom of the Remuera job. He said this was something he could do because the job was for a friend. He was also given a larger sample which he tested in his own workshop.

[21] On the basis of what he had observed at Remuera, his discussions with Mr Reid and Mr Marusich, and his use of the Ultraseal samples, Mr Iversen concluded

that Ultraseal would be a better product for the deck than the Flexicoat he had originally ordered. He then recommended to Mr Clark that Ultraseal be used instead of Flexicoat for the deck. Mr Clark accepted Mr Iversen's recommendation. Accordingly, Mr Iversen said, he ordered the Ultraseal product and adhesive.

[22] Mr Reid and Mr Marusich gave different accounts of this meeting. Mr Reid accepted that he and Mr Marusich met Mr Iversen at a work site in around May to July 2001. Mr Marusich did not recall a meeting at a work site, but said he and Mr Reid met Mr Iversen at Mr Iversen's home. Both accepted that Mr Iversen could have been shown a "sales gimmick" which Mr Reid described as a jar of water turned upside down on a piece of cardboard coated with the original Ultraset product, but adamantly denied that any "experiment" was conducted.

[23] Mr Reid acknowledged that it was not uncommon for tilers to use their vans as offices, carrying their documents for various jobs around with them, but he was confident that Mr Iversen did not show him the plans for the house, and he did not recall doing any calculations of required product and cost. He accepted that he had recommended UltrasealR to Mr Iversen as the most suitable product for waterproofing the external deck area on the Island job.

[24] Mr Reid recalled that the deck was to be constructed of fibre-cement sheets over timber, and to be large, but did not recall Mr Iversen saying it was on poles, or how large it was.

[25] Mr Reid also disputed Mr Iversen's evidence that he described the "tanking" method to be used in applying the waterproof membrane. Whereas Mr Iversen said that he had explained to Mr Reid that "tanking" involved the first layer of the membrane extending over window and door sills and 150 to 200 millimetres up vertical surfaces, Mr Reid said in evidence that "tanking" meant waterproofing 150 to 200 millimetres up vertical surfaces (if not the whole vertical surface), with an "apron" extending approximately 200 millimetres out onto the deck. He said that a "shallow bowl" was created when the waterproofing membrane was applied to the horizontal surface, over the top of the "apron" that extended from the membrane applied to the vertical surface.

[26] Mr Reid accepted that he understood from Mr Iversen that the window and door joinery was to be installed after the “tanking” process had been completed, and that the stonework would be applied to the walls after the joinery.

[27] Mr Reid also accepted that Mr Iversen told him that the waterproofing membrane was to be applied to fibre cement sheets over timber framing.

[28] Mr Marusich said his recollection of discussions with Mr Reid and Mr Iversen in relation to the job on the Island was “very vague indeed”. He said he knew Mr Iversen had “a big job on an Island”, but did not recall being shown plans, or being given details of the area to be waterproofed.

[29] Although there is no cause of action based on this meeting, I accept Mr McEntegart’s submission that it provides important context to the alleged representation in November 2001, on which Lockwood’s claim is founded. Accordingly, I accept:

- a) That there was a meeting between Mr Iversen and Mr Reid and Mr Marusich during the period May to July 2001, and that it was at a site where Mr Iversen was working at the time, in Remuera. The circumstances of Mr Iversen’s being engaged on a job for a friend, and able to invite Mr Reid and Mr Marusich to the site, make it more likely that his recollection is more reliable than that of Mr Reid and Mr Marusich, who were both engaged in marketing Ultraseal to tilers, builders, and architects, so both are less likely to have a clear recollection of a specific meeting;
- b) Mr Iversen’s evidence that he had the plans for the house with him, and showed them to Mr Reid and Mr Marusich who were both, therefore, made aware of the extent of the tiling job;
- c) That Mr Iversen talked about the proposed method of “tanking” to Mr Reid and Mr Marusich, and in doing so understood that to mean to cover the entire deck area and extending 150 to 200 millimetres up

vertical surfaces. However, I also accept that Mr Reid's understanding of "tanking" was different. The "shallow bowl" effect of tanking described by Mr Reid in his evidence can result whether the bowl is created in a single application (as Mr Iversen intended) or in two applications (as Mr Reid intended); and

- d) As Mr Reid acknowledged, that Mr Reid recommended Ultraseal as the most suitable product for waterproofing the external decks of the house.

The first layer of Ultraseal

[30] Mr Iversen's evidence was that the first layer of Ultraseal was applied over a weekend in August 2001. The layer comprised two coats, the first applied in a "north-south" direction on the first day, and the second applied in an "east-west" direction on the second day.

[31] Mr Iversen outlined the preparatory work done before the first coat of Ultraseal was applied. He said that when he arrived at the house the fibre cement sheets of the substrate were exposed. The surfaces were clean and dry. At the time he arrived, he said, the builders were just completing their work on the deck substrate. Spaces between individual sheets had been filled by the builders with a silicone-type sealant. He also said that he saw the builders applying sealant over the tops of screws, and trowelling the sealant off.

[32] Mr Iversen first applied Ultraseal over door and window sills, and applied tape to joints in the substrate sheets. He said he did this by first applying Ultraseal over the area then, while it was still sticky, embedding the tape in the Ultraseal. When that had cured off, he applied Ultraseal over the taped area. He said the tape was a woven tape, and that it was a Bostik product that he purchased from Mitre 10.

[33] The first and second coats of Ultraseal were then applied over the entire deck surface, the door and window sills, and 150 to 200 millimetres up walls and other vertical surfaces.

[34] Mr Iversen said that he understood he was to lay “a thick rollable coat ... as thick as I could get it with a roller”. He found Ultraseal harder to use than all other waterproofing products he had used in the past, in that it was heavier and stickier. However, he did not see that as a disadvantage, because it seemed to him that the heavier the product, the more robust it would be. Mr Iversen was confident that he had achieved a consistent depth, based on the colouring of the product on the substrate.

[35] Mr Iversen said that before the builders left the site before the weekend, he had a discussion with them about traffic on the deck. He understood that there would be minimal stepping out onto the deck when the window and door joinery was fitted (it was to be fitted from the interior of the house) and he was satisfied there would not be any threat to the waterproofing membrane. Further, he told the builders to put down drop sheets while fitting the joinery.

[36] Mr Iversen returned to the Island in October 2001, to undertake the stone cladding work on the walls of the house. This work was completed during October and November 2001. When he did the stone cladding beside the deck he used a drop sheet, with a sheet of ply on top, then another drop sheet on top of the ply, covering an area about two metres out from the wall, to protect the waterproofing membrane from any damage.

Request for assurance from Bostik as to suitability of Ultraseal

[37] Mr Lockwood entered into the agreement to buy the Island on 16 November 2001. He then nominated Lockwood Developments as purchaser.

[38] Mr Lockwood said in evidence that at the time he entered into the agreement a waterproofing layer had been applied to the deck. He discussed the waterproofing and tiling with Mr Iversen. He said this was in November 2001, at the Island.

[39] It was put to Mr Lockwood that this discussion was in mid-December 2001. However, I accept Mr Lockwood’s evidence that the discussion was in November. It is supported by an entry “at Island” for 26 November 2001 in Mr Lockwood’s diary.

Further, Mr Iversen said in his evidence that he met Mr Lockwood, the new owner, in late November 2001, when he was doing the stone cladding work.

[40] The quality of the waterproofing of the deck was of critical concern to Mr Lockwood. He said this was particularly so because there was accommodation underneath the deck. Further, Mr Lockwood's experience in the insurance industry as an Insurance Broker had given him a heightened awareness of weathertightness issues that could arise from inadequate waterproofing. He was determined to ensure that the best available product was used.

[41] Mr Lockwood said notwithstanding that one layer of waterproofing had already been applied to the deck, he wanted to revisit the issue and was prepared if necessary to have what was on the deck removed and replaced with a product that was superior or better suited to the job. He said the builder had suggested that bitumen would be better.

[42] Mr Lockwood expressed his concerns to Mr Iversen and said that he required an assurance from Bostik that Ultraseal was the best available product and the most suitable for the job. Mr Iversen's evidence was that he rang Mr Reid, of Bostik, from the Island. He described the call in his brief of evidence as follows:

I rang Grant Reid from the Island. I told him there was a new owner and that he had asked for confirmation that Ultraseal was the appropriate and best product for the job. In telling Grant how the subject had been raised by Steve Lockwood, I may have mentioned that the builder had expressed to Steve a preference for another product. Grant stated in the course of our conversation that he remained of the view that Ultraseal was the best product for the waterproofing of the deck and he raised no reservations about its suitability for the job or any issues as to its application.

[43] Mr Reid said in his brief of evidence that he did not recall receiving a call from Mr Iversen in November 2001. He said he recalled becoming aware of the new owner, but believed this was in October or November 2002. However, in cross-examination Mr Reid accepted that he did recall a telephone call from Mr Iversen, and discussing whether he remained of the view that Ultraseal was the best product for the job. He could not recall whether that telephone call was in November 2001.

[44] I accept the evidence of Mr Lockwood and Mr Iversen, that Mr Iversen telephoned Mr Reid in November 2001, at Mr Lockwood's request, for the express purpose of obtaining an assurance that Ultraseal was the best and most appropriate product to waterproof the deck. Further, I accept Mr Iversen's evidence that Mr Reid gave that assurance. Accordingly, I find that Mr Reid made the alleged representation.

[45] Mr Iversen passed the assurance on to Mr Lockwood, and Mr Lockwood approved the use of Ultraseal. I find that Mr Lockwood relied on the assurance in deciding to approve the use of Ultraseal to waterproof the deck.

The second layer of Ultraseal

[46] Mr Iversen returned to the Island to apply the second layer of Ultraseal in early 2002. He inspected the waterproofing membrane and was happy with its condition. He said it appeared to have been treated in accordance with his requests that there be light traffic, and that it be protected when work was done near it. He had not seen any areas of the membrane that needed repair work when he was there in October 2001, but when he returned in early 2002 he found that a small repair was needed around a drain.

[47] Before applying the second layer of Ultraseal, Mr Iversen cleaned off the membrane surface with water and a mild detergent. At the same time he did a "flood test" of the membrane. He accepted that the flood test involved only observation of the membrane during cleaning and rinsing. It did not involve blocking the drains and filling the deck area with water. He considered that there was a considerable amount of water on the deck, that would be equal to or more than heavy rainfall.

[48] The second layer of the Ultraseal membrane was applied in the same manner as the first, in that two coats were applied over two days. The first coat was applied in a north-south direction and the second coat, on the second day, in an east-west direction. The Ultraseal membrane was then allowed to cure before tiling.

Tiling

[49] Mr Lockwood's evidence was that all tiling was completed by 15 May 2002.

[50] Mr Iversen was asked how long it took to complete the tiling of the deck. His response was that it was "unfair" to give an exact time, because he and his team were weather-dependent, and were doing other work inside the house when it was wet. It was put to him that it would take a team of three no more than one working week to complete the tiling. He responded that because there was a lot of cutting involved, movement control joints were being put in, and there may not always have been three people working on the deck job at any one time, the deck tiling could have taken longer.

Leaks from the deck to the accommodation below

[51] Mr Lockwood said that in August 2002, after substantial rainfall, water was found to have leaked through into the Caretaker's flat underneath the deck. He consulted with Mr Iversen and Bostik. Mr Reid and Mr Marusich went to the Island in November 2002 and met with Mr Iversen and Mr Lockwood. The leak was near to a set of bi-fold doors leading from the deck to the house. Mr Lockwood identified the site of this leak as being immediately above the main entry to the house. Following the visit, Mr Reid advised Mr Iversen that tiles had lost adhesion to the Ultraseal membrane. He recommended remedial work of re-sealing joints in the fibre cement substrate, reinstating the Ultraseal membrane then re-tiling. This work was carried out by Mr Iversen.

[52] During 2003 water leaked through the deck to the ceiling of the rooms below it, affecting bedrooms, a bathroom and hall area. At the beginning of August 2004 Mr Lockwood advised Mr Reid that further leaking had occurred along the deck following the repairs carried out in November 2002, to the point that the ceilings had collapsed in some areas, and had to be replaced. Mr Lockwood advised Mr Reid that the waterproofing membrane had failed. He invited Mr Reid to have a

representative on site, together with an independent representative, when the tiles were lifted to commence remedial work.

[53] Mr Alec de Martin, Technical Adviser, responded on behalf of Bostik. He asserted that the leaks were not attributable to a fault in the waterproofing membrane, but rather to shortcomings in the application of the membrane. Mr de Martin visited the Island on 6 September 2004. He prepared a report following the visit, in which he summarised his conclusion as follows:

In summary, the failure at Motukiekie Island can be put directly to application issues, and in no way can be claimed as being a product failure.

Therefore, [Bostik] do not accept any liability in this matter.

Issues

[54] As noted earlier, the Trustees' claim is based on a single cause of action: that in November 2001 Bostik representatives negligently misrepresented that Ultraseal was the best product and was suitable and appropriate for waterproofing the deck of the house. That requires determination of the following issues:

- a) Was there a representation? and if so:
- b) Was it a negligent misrepresentation?¹
- c) Did the trust rely on the representation? and
- d) Did the product fail, causing loss to the Trustees?

[55] If those issues are determined in favour of the Trustees, it is then necessary to consider further matters raised in Bostik's defence, namely:

- a) Irrespective of whether any representation by Bostik was a negligent misrepresentation, was the water ingress to the Caretaker's flat caused by any failure of the waterproofing membrane, or by other means?

¹ See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL)

- b) If the membrane failed, was that because UltrasealR was unsuitable for the job, or because it was poorly applied?

[56] In the event that the Court finds that there was a negligent misrepresentation, that caused the Trustees to suffer loss, it will be necessary to consider Bostik's affirmative defences, namely:

- a) That the Trustees' sole pleaded cause of action, set out in its amended statement of claim filed in January 2009, is statute-barred;
- b) That Bostik did not assume any responsibility to Lockwood Developments, or to the Trustees, the subsequent purchaser;
- c) Contributory negligence: that Mr Lockwood on behalf of Lockwood Developments did not make all reasonable and prudent inquiries concerning the use of Ultraseal; and
- d) That the Trustees have suffered no loss, or less than that claimed.

The alleged negligent misrepresentation

[57] I have recorded, at [44] above, my finding that a representation was made by Mr Reid to Mr Iversen in November 2001, that Bostik was the best and most appropriate product to waterproof the deck. I have also recorded, at [45] above, my finding that in reliance on that representation Mr Lockwood, on behalf of Lockwood Developments, approved the use of Ultraseal to waterproof the deck. I turn to consider the Trust's claim that the representation was a negligent misrepresentation.

The Trustees' submission

[58] Mr McEntegart submitted that the representation was a negligent misrepresentation because:

- a) The properties of Ultraseal, in particular its thickness, made it difficult to work with and apply consistently over an area as large as the deck; and
- b) The “product literature” provided by Bostik at the time of the representation in November 2001 did not state that it was necessary to “reactivate” the waterproofing membrane with a solvent in the event that there was, as in the present case, a gap of more than seven days between the application of the first and second layers of the membrane.

The “product literature” for Ultraseal

[59] It is necessary to refer to the product literature for Ultraseal in some detail.

[60] The first document referred to was issued in 1997. It was headed “Ultraseal Polyurethane Wet Area Waterproofing Membrane” and described the “Ultraseal wet area membrane system” as “a flexible and elastic one part polyurethane waterproofing system”. It gave as the “purpose for use” of Ultraseal:

Waterproofing internal areas including shower recess bases (membrane forms a shower tray) and associated floors and walls.

[61] The second document referred to was issued in October 1998 and was headed “Ultraseal Polyurethane Waterproofing Membrane” “Application Instructions”. It gave a similar description of the “purpose for use” of Ultraseal:

Waterproofing internal wet areas including shower recess base (membrane forms a shower tray) and associated hobs and wall corners up to intending tile height. To obtain ultimate membrane complete wall cover to tile height can be applied.

[62] The third document referred to was issued in July 1999, and repeated the “purpose for use” wording of the October 1998 document.

[63] The fourth document referred to was that current at the time of the visit by Mr Reid and Mr Marusich to Mr Iversen in mid-2001. It was issued in September 2000 and is headed “Ultraseal and UltrasealR Polyurethane Waterproofing

Membrane” “Technical Data Sheet”. It was the first document to refer to UltrasealR. It described Ultraseal and UltrasealR as:

... high performance flexible one component trowel/brush or roller applied polyurethane waterproofing membranes specifically designed for wet area applications.

[64] The recommended uses were described as:

- Waterproofing internal and external wet area (refer to precautions)
- Waterproofing balconies, podiums, kitchens, toilets, bathrooms, floors and walls prior to application of surface wearing toppings
- Use on concrete slabs, cement rendered concrete, masonry, fibre reinforced cement sheeting, water resistant plasterboard and plywood
- Waterproofing shower recess bases
- Waterproofing and sealing of planter boxes.

[65] The document recorded that Ultraseal and UltrasealR were available in 15 litre pails and 600ml “sausages”.

[66] “Ultraseal” was referred to as a “trowel/brush grade” and “UltrasealR” was referred to as a “roller grade”. With respect to UltrasealR, the data sheet said:

Rollable grade (colour sandstone)

For large horizontal wet areas such as upstairs bathrooms, kitchens, balconies or podium’s Ultraseal (R)rollable would be most suited.

[67] The coverage rate for both grades was stated as being that 1 litre, applied by brush or roller, would cover 0.75 metres squared at 1.3mm thickness.

[68] The document included application instructions. These included preparation instructions, instructions as to application of the membranes, and instructions as to tiling and mortar bed covering. For both the “trowel/brush” and “rollable” grades the data sheet said:

A minimum cured depth of 1mm must be maintained to achieve a waterproof membrane, however, it is recommended a coverage rate of 1.3mm thickness of Ultraseal be applied.

[69] With respect to tiling over the membrane the data sheet said:

This may be carried out after Ultraseal has been allowed to cure approx. 24 hours at a temperature of 25°C (slightly longer in lower temperatures). To eliminate possible surface contamination it is recommended tiling or mortar bedding should be carried out within 72 hours of membrane application as extended periods of exposure will require the provision of membrane protection.

[70] Further documents were referred to, issued in September and October 2001. These are headed “Ultraseal Polyurethane Waterproofing Membrane” and appear to be identical to the data sheet issued in September 2000, apart from differences in the heading.

[71] The final documents referred to were issued in April 2005 and March 2006. The April 2005 data sheet contains the first reference to Ultraseal LV, described as follows:

Ultraseal LV is especially formulated for application by roller on large exterior level decks and podium areas where a thinner, easier to apply coating is required. Ultraseal LV is not suitable for vertical applications.

[72] The description of UltrasealR is different from that in earlier documents. It is as follows:

UltrasealR (rollable) is most suited for vertical and horizontal wet areas such as larger bathrooms, laundries and kitchens.

[73] The 2005 data sheet also noted the packaging for the three “grades” of Ultraseal. Whereas up until the September 2001 data sheet both Ultraseal and UltrasealR were said to be available in 15 litre pails and 600ml “sausages”, the April 2005 and March 2006 data sheets stated that only Ultraseal (trowel/brush grade) was available in 600ml “sausages”, UltrasealR was available in 15 and 4 litre pails, and Ultraseal LV was only available in 15 litre pails.

[74] Finally, the court was referred to a copy of the current label for a 15 litre pail of UltrasealR. It refers to Bostik’s “Ultraseal installation sheet” for application details. Mr Rule’s evidence was that as far as he could ascertain the same labelling was used in 2001.

The Trust's submission that UltrasealR was not the best and most appropriate product to waterproof the deck

[75] Mr McEntegart submitted that UltrasealR was a “relatively new product” when it was recommended to Mr Iversen in mid-2001. This was acknowledged by Mr Rule, Mr Reid, and Mr de Martin, although Mr Reid and Mr de Martin maintained that “Ultraseal is Ultraseal”. Mr McEntegart also referred to Mr Rule’s acknowledgement that UltrasealR would not have been used much “in the field” by the time it was recommended to Mr Iversen.

[76] Mr McEntegart founded his submission that UltrasealR was not the best and most appropriate product to waterproof the deck on the evidence given by Mr Trevor Jones.

[77] Mr Jones is a Building Surveyor, and was called by the Trustees to give expert evidence on matters within his expertise. He is a Fellow of the Royal Institute of Chartered Surveyors and a Member of the New Zealand Institute of Building Surveyors. He has experience in the technical analysis of building defects, specification and contract administration of building repair works, building and condition surveys of buildings, weathertightness detailing and defect diagnosis, and assessing Building Code Compliance.

[78] In his written brief of evidence Mr Jones said that, having carefully reviewed the “Bostik Technical Literature” in the context of applying the membrane to a timber structured deck of 200m², he was “of the view that it would be very difficult to lay the product within the parameters set out in the literature.” He gave the following reasons:

- (a) The Ultraseal product is thick and would therefore be a very difficult membrane to work with over a very large external area.
- (b) That difficulty would be a very real impediment to achieving a consistent depth over such a large area.
- (c) The thickness of the membrane could only, realistically, be judged by the applicator observing the product after it was laid. In those circumstances, a difference between say 1.3 mm and 1 mm of wet material over a substantial area would be impossible to detect.

- (d) The difficulties I have referred to above, make the product all the more unsuitable for a large timber deck, because the stresses in deflection and movement that such a deck experiences in an exposed environment would mean that even minor inconsistencies in the application (as would be inevitable here) could compromise the integrity of the waterproofing.

Bostik's submissions with respect to the alleged misrepresentation

[79] Ms Challis submitted that the Trustees had not proved that the representation (if made) was a misrepresentation.

[80] Ms Challis pointed first to the evidence given by Mr Reid that Ultraseal was, by 2001, being used on many occasions both internally and externally under tiles, that external use was generally on decks or balconies, and that Ultraseal was, at that time, being used both over concrete and over fibre cement sheets on timber framing. She also referred to Mr Reid's evidence that he had had involvement in a number of jobs where Ultraseal had been used successfully to waterproof timber decks over fibre cement sheets, including a large roof/deck approximately 500m² in size.

[81] Ms Challis then referred to evidence given by Mr Reid and Mr de Martin that no difficulties had been encountered as to Ultraseal's suitability as a waterproofing membrane. Mr Reid said that, by virtue of his role, he was the first point of contact if problems arose with Bostik products. The only occasion on which a problem of any significance arose with Ultraseal (apart from the present matter) was where the membrane had been exposed to sunlight for a long period of time, and an unsuitable tile adhesive had been used. Mr de Martin was aware of no issues having been raised as to the waterproofing qualities of Ultraseal.

[82] Ms Challis also referred to the evidence given by Mr Gregory O'Sullivan, called by Bostik as an expert witness.

[83] Mr O'Sullivan is a Registered Building Surveyor and Quantity Surveyor. He has had over 30 years direct involvement in building design and contract administration, and in the last 14 years has focused primarily on the design, administration, and cost management of remediation. Building and product failure forms the largest part of his consultancy work.

[84] Like Mr Jones, Mr O'Sullivan was asked to provide his opinion as to (amongst other matters) the suitability of Ultraseal for waterproofing the deck. Mr O'Sullivan said that urethane membranes, such as Ultraseal, are suitable for application on fibre cement sheets over timber framing, and suitable for decks and balconies. He also said that he had been inspecting deck and tile-related failures in New Zealand since 1994 and had dealt with membrane and deck issues of various kinds. The present case was the first occasion where he had encountered a failure where a urethane membrane had been used.

[85] Ms Challis submitted that Mr Jones' opinion that Ultraseal "would be difficult to lay within the parameters set out in the literature" was not sufficient grounds on which the Court could find that UltrasealR was not the best product and was not suitable and appropriate to waterproof the deck.

Discussion

[86] Before Bostik can be held liable to the Trustees, the Trustees must prove on the balance of probabilities that the representation that has been found to have been made was a misrepresentation; that is, that one or more of its elements was false. It is only if that is established that the Court will be required to consider whether it was made negligently.

[87] Both the Trustees and Bostik focused in the evidence put before the Court, and in submissions, on the element of the representation as to Ultraseal being "suitable and appropriate for the job". No evidence was put before the Court, and no submissions made, in respect of the element that Ultraseal was "the best" product.

[88] Mr Jones' evidence was given in a careful, considered, and measured way, and was of considerable assistance to the court. However, I am not satisfied on the balance of probabilities on the basis of his evidence, and the evidence of what occurred in this case, that the representation was a misrepresentation.

[89] Mr Jones' evidence, and the evidence of what occurred in relation to the deck, must be considered against the evidence given for Bostik, that Ultraseal had

been used successfully to waterproof large decks, and that it had been used successfully on tiled decks constructed of fibre cement sheets over timber framing.

[90] To put my conclusion another way, I am not satisfied on the balance of probabilities that it was a misrepresentation to say that Ultraseal was suitable and appropriate to be applied as a waterproofing membrane on the deck.

Remaining submissions

[91] In light of the above finding, it is not necessary to consider the remaining submissions on behalf of the Trustees or Bostik. However, I record that had I been required to do so, I would have found, for reasons similar to those set out above, that the representation was not negligently made. On that issue, the evidence given by Mr Reid, Mr de Martin, and Mr O'Sullivan as to previous successful use of Ultraseal as a waterproofing membrane is of particular relevance in concluding that the representations were not negligently made.

Result

[92] The above finding disposes of the Trustees' claim against Bostik. Judgment is given in favour of Bostik.

[93] Counsel did not address me on the matter of costs. If there is any issue as to costs, counsel may submit memoranda: that for Bostik within 21 days and that for the Trustees within a further 21 days. Counsel should indicate in their memoranda whether the matter may be dealt with on the papers.