IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV-2011-419-001358
[2012] NZHC 298

BETWEEN	KENNETH GILMOUR Appellant
AND	DECISIONMAKERS (WAIKATO) LIMITED First Respondent
AND	RODNEY JOHN HARTLES Second Respondent

Hearing: 27 February 2012

Counsel: M Wolff for Appellant
D M O'Neill for First and Second Respondents

Judgment: 8 August 2012

RESERVED JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Wednesday, 8 August 2012 at 11:00 am pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel:

Mr M Wolff, Grimshaw & Co., Auckland.
D M O'Neill, Barrister, Hamilton.

Introduction

[1] This appeal is all about the duties of a financial adviser to a client who has made investments through the adviser in finance companies which have subsequently collapsed – in this case, Bridgecorp Ltd (Bridgecorp) and Property Finance Securities Ltd (Property Finance).

[2] In the District Court, Judge Spiller ordered that Decisionmakers (Waikato) Limited (Decisionmakers) pay Mr Gilmour $72,700. Decisionmakers has subsequently been put into liquidation without paying the judgment sum. Mr Gilmour appeals against the Judge's finding that Mr Rodney Hartles, the sole director and employee of Decisionmakers, was not personally liable for the judgment sum. He also appeals against the Judge's ruling that two deductions totalling $27,300 should be taken from Mr Gilmour's losses of $100,000.

[3] Decisionmakers cross appeals against the Judge's order that it pay Mr Gilmour $72,700.

Factual background

[4] Mr Gilmour is a former pharmacist, who was in partnership in an Auckland pharmacy. When he retired from the partnership in about 2000, he received a lump sum of $100,000. He initially invested this in a managed fund through Forsyth Barr but later cancelled the investment because it was making a loss.

[5] Mr Gilmour's mother died about the time he retired from the partnership. Her estate included a sum of money in an AMP managed fund. The investment was left to Mr Gilmour. Mr Gilmour contacted an AMP representative, Mr Alan Hartles, to discuss the investment. He visited Mr Alan Hartles on 10 May 2000 and 9 June 2000. Mr Gilmour is able to be specific about those dates because of diary notes he made at the time.

[6] Following discussions with Mr Alan Hartles in which Mr Gilmour told Mr Alan Hartles that he did not wish to invest in another managed fund because of

the losses he had made, Mr Alan Hartles referred Mr Gilmour to his brother, Mr Rodney Hartles, to discuss alternative investments. During the course of his discussions with Mr Alan Hartles, Mr Alan Hartles gave Mr Gilmour an application form for an investment in secured debenture stock offered by Strategic Finance Ltd (Strategic Finance). The application form contained a stamp bearing Mr Rodney Hartles' name and contact details.

[7] Without consulting Mr Rodney Hartles (Mr Hartles), on 21 June 2000, Mr Gilmour invested a total of $28,000 with Strategic Finance for two years at a rate of 9.15% per annum.

[8] Mr Gilmour spoke to Mr Hartles by telephone on 26 June 2000. Mr Hartles then sent Mr Gilmour a compliment slip enclosing a copy of the application form completed by Mr Gilmour and stating that he looked forward to doing more business with Mr Gilmour in the future.

[9] On 12 October 2001, Mr Gilmour called Mr Hartles to discuss further investments. At that stage Mr Gilmour had $100,000 to invest. He said he explained to Mr Hartles that he was retired and wanted a low-to-medium risk investment portfolio that could provide quarterly interest that he could use as income. On Mr Hartles' recommendation, on 16 October 2001, Mr Gilmour invested $100,000 with Bridgecorp for two years at a rate of 7.5% per annum.

[10] On 3 May 2002, Mr Gilmour called Mr Hartles to discuss the investment of further funds. Mr Hartles recommended Property Finance. Relying on Mr Hartles' advice, Mr Gilmour sent Mr Hartles a completed application form and a cheque for $42,000 dated 10 June 2002 for an investment with Property Finance for three years at a rate of 8.75% per annum.

[11] On 6 October 2002, Mr Gilmour invested $80,000 with St Laurence Property & Finance Ltd (St Laurence) for four years at a rate of 10.5% per annum and another $20,000 with Property Finance for a term of two years at a rate of 8.5% per annum, again on Mr Hartles' recommendation.

[12] On 23 September 2003, after speaking with Mr Hartles about his Bridgecorp investment, which was due to mature on 16 October 2003, Mr Gilmour rolled over the $100,000 deposit in Bridgecorp for a further five year term at a rate of 8.4% per annum.

[13] On 5 October 2004, again after discussing matters with Mr Hartles, Mr Gilmour sent Mr Hartles a letter requesting him to invest a further $12,000 with Property Finance on his behalf in addition to the $20,000 that was due to mature and was to be reinvested for three years at a rate of 8.95% per annum.

[14] Shortly after making these further investments, Mr Gilmour decided to help his daughter and her husband finance the building of a house and sought to cash in some of his investments. Mr Gilmour arranged for an early redemption request form in relation to his Bridgecorp investment to be sent to Mr Hartles but was told by Mr Hartles that if he withdrew his Bridgecorp investment, Mr Hartles would lose most of his commission. Instead, at Mr Hartles' suggestion, Mr Gilmour contacted St Laurence and Property Finance and arranged withdrawals of the entirety of the St Laurence investment and some of the Property Finance investments. That left Mr Gilmour with only the Bridgecorp and some of the Property Finance investments.

[15] In 2006, when his Property Finance investments came to maturity, Mr Hartles phoned Mr Gilmour to discuss them. Mr Hartles advised Mr Gilmour that they continued to be suitable investments for him. On Mr Hartles' advice, on 9 June 2006, Mr Gilmour reinvested $8,000 with Property Finance for three years and on 28 November 2006 another $15,000 with Property Finance for one year.

[16] On 2 July 2007, Bridgecorp went into receivership. Mr Gilmour has not recovered the $100,000 invested with Bridgecorp. On 31 August 2007, Property Finance also went into receivership. Mr Gilmour later recovered $3,679.99 of his $23,000 investment with Property Finance.

[17] On 3 June 2009, Mr Gilmour lodged a formal complaint against Mr Hartles with the Institute of Financial Advisers (the Institute).

[18] On 14 December 2009, the Institute wrote to Mr Hartles stating:

> The [Complaints] Committee was concerned at several aspects of the matters reported to it, and gave serious consideration to prosecuting you before the Disciplinary Tribunal of the Institute. If as your claim, your services were solely transactional, this should have been recorded in writing to the client. If they were not, there seems to have been a total non-compliance with practice standards.
>
> The Committee took into account that the events had occurred several years ago, and that you had obtained guidance on best practice in the intervening years, and seem to have followed it.
>
> It is prepared to dismiss the complaint if you accept that you have been censured and if you meet costs of $2,000 by 21 December 2009.

[19] On 22 December 2009, the Institute informed Mr Gilmour that Mr Hartles had accepted censure and paid $2,000 costs.

District Court judgment

[20] After setting out the factual background, Judge Spiller set out six issues which were for determination in the proceedings. The Judge's findings in relation to two of the issues are not subject to appeal. The other four issues were:

(a) Was Mr Hartles negligent in relation to Mr Gilmour?

(b) Did Mr Hartles breach the Fair Trading Act 1986 in relation to Mr Gilmour?

(c) If liability is found and the claims are not statute-barred, how much of Mr Gilmour's loss should be awarded?

(d) If liability and quantum of loss are found, who should be found liable: Mr Hartles and/or Decisionmakers?

[21] On the first issue, the Judge found that there was a duty of care owed by Mr Hartles to Mr Gilmour. He found that Mr Gilmour and Mr Hartles were in the relationship of client/financial adviser and that Mr Gilmour was a man of limited

investment knowledge and experience who sought the advice of Mr Hartles as a source of investment knowledge and expertise.

[22] In relation to whether or not Mr Hartles breached the duty of care that he owed to Mr Gilmour, the Judge noted the following six factors:

(a) Mr Hartles' usual business practice was to take a new client through a seven-step process, but he did not do this with Mr Gilmour. He did not go through this initial financial planning process because he assumed that his brother, Mr Alan Hartles, and Mr Gilmour had already been through the process.

(b) Mr Hartles appeared to have decided that Mr Gilmour was seeking a medium-risk investment on the basis of indicators from Mr Gilmour's prior investment behaviour rather than on the basis of direct inquiries of or responses from Mr Gilmour himself.

(c) Mr Hartles appeared to have recorded few details of meetings and discussions with Mr Gilmour, despite the multiple contacts and investments arranged for which Mr Hartles obtained commission over the period 26 June 2000 to 28 November 2006. The absence of records taken by Mr Hartles was of concern to the Institute of Financial Advisers Complaints Committee, which upheld Mr Gilmour's complaint. The Committee held that if Mr Hartles' services were solely transactional, this should have been recorded in writing to the client; and, if they were not, there "seems to have been a total non-compliance with practice standards".

(d) Mr Hartles accepted that, in September 2003, Mr Gilmour "must have spoken" to him about renewing the $100,000 Bridgecorp investment. He also accepted that a $100,000 investment in Bridgecorp for five years would not have been a suitable investment for Mr Gilmour.

(e) In October 2004, Mr Hartles was approached by Mr Gilmour to arrange the withdrawal of this $100,000 investment from Bridgecorp, but Mr Hartles did not proceed with this withdrawal on behalf of Mr Gilmour.

(f) It is generally accepted that the investment portfolio that Mr Gilmour had, as a result of his investments through Mr Hartles, was not appropriate for someone in Mr Gilmour's position. Mr Hartles himself accepted that, if Mr Gilmour had sought his advice, he would have recommended a diversified portfolio. In evidence he also accepted that 100% investment in finance companies would not be a suitable investment for a retired man. This assessment was backed by the evidence of experts called by both the plaintiff and defendants.

[23] The Judge's conclusion on the issue of a breach of duty of care is as follows:

> [25] I return to the evidence in the present case. I can reach no other conclusion than that Mr Hartles, as the financial adviser to Mr Gilmour, breached the duty of care that was owed to Mr Gilmour. The evidence strongly suggests that Mr Gilmour did not receive the level of service that he should reasonably have expected from Mr Hartles. Although Mr Hartles was being paid commission on each of the investments made by Mr Gilmour, the latter was in fact in a twilight zone where his adviser had inadequate information or records about his client. There is no evidence that Mr Hartles identified Mr Gilmour's goals, discussed budgeting and risk management, prepared an investment plan, implemented such a plan or reviewed it periodically. It is clear that Mr Hartles' conduct in relation to Mr Gilmour's investments, up to and including the 2003 Bridgecorp reinvestment of $100,000 and the 2006 Property Finance investments of $23,000, was negligent. The result was that Mr Gilmour was left exposed and at risk with an investment portfolio that did not meet his actual needs and was not appropriate for an investor in his position.

[24] The Judge then held that Mr Hartles' breach of his duty of care to Mr Gilmour caused his losses and that these were reasonably foreseeable. He was satisfied that Mr Hartles' breach materially contributed to Mr Gilmour being deprived of the chance of making prudent and appropriate investments.

[25] On the second issue, the Judge then considered whether or not Mr Hartles had breached s 9 of the Fair Trading Act 1986, which states that "no person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or

deceive". In view of the facts he found proven, the Judge found, first, that Mr Hartles' conduct was capable of misleading Mr Gilmour in relation to his investments. Secondly, that Mr Gilmour was misled by Mr Hartles' conduct, in that Mr Gilmour was under the impression that the advice he received from Mr Hartles was appropriate for an investor in Mr Gilmour's position, whereas in fact it was not. Thirdly, he found that it was reasonable for Mr Gilmour, in view of the respective state of knowledge of Mr Gilmour and Mr Hartles, and the nature of their relationship, to be misled by Mr Hartles' conduct. The Judge further found that Mr Hartles' breach of the Fair Trading Act caused loss to Mr Gilmour, in that he was satisfied that Mr Hartles' breach materially contributed to Mr Gilmour being deprived of the chance to make prudent and appropriate investments.

[26] On the third issue, as to the amount of Mr Gilmour's loss that should be awarded as damages, the Judge noted that Mr Gilmour had claimed the full amount of his investment in Bridgecorp ($100,000), the balance of his Property Finance investments after he received a small payout ($19,320.01), and general damages ($25,000). The Judge looked first at the Bridgecorp investment. He found that it had been established in evidence that a reasonable financial adviser would not have invested more than 10% of the total capital investment in each of Bridgecorp and Property Finance. The Judge, therefore, deducted $12,300 (being 10%) of the total investment of $123,000 (leaving a balance of $87,700). He then adopted the approach of the High Court in *Armitage v Church*,[1] of discounting the claim for imponderables. The Judge made an assessment of whether and to what extent Mr Gilmour would have safeguarded his funds in low to medium risk investments, had Mr Hartles' advice met the required standard. On that basis, he allowed a further deduction of $15,000 (being 15% of the Bridgecorp investment), leaving a final balance of $72,700.

[27] The Judge then turned to the claim for the Property Finance investment. However, he understood there was a possibility of a significant payout being made on the Property Finance investment, in addition to that which had already been made. In light of that, he made no allowance for the claim for the balance of the

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[1] *Armitage v Church* HC Wellington CIV-2009-485-1952, 27 May 2011 per Dobson J.

Property Finance investment. He left Mr Gilmour to his rights to claim whatever payout is made by Property Finance.

[28] The Judge then noted that there was no evidence led by Mr Gilmour to support his claim for $25,000 general damages and so this part of the claim was dismissed.

[29] On the fourth and final issue, as to who should be found liable, Mr Hartles and/or Decisionmakers, the Judge noted that throughout the dealings between Mr Gilmour and Mr Hartles, the latter made it clear that he was employed by the company then operating, firstly, Broadbase Waikato Ltd (Broadbase) and, then, Decisionmakers. The first document sent by Mr Hartles to Mr Gilmour was on a compliment slip clearly marked Broadbase. Subsequent documentation involving Mr Hartles was to the same effect. He also noted that Mr Gilmour himself was aware that Mr Hartles was representing a company, as is reflected in Mr Gilmour's letter of 5 October 2004, addressed to Broadbase. The Judge could find no assumption of personal responsibility by Mr Hartles and, therefore, held that liability in the case should rest with Decisionmakers alone.

[30] The Judge, therefore, ordered that Decisionmakers to pay $72,700 to Mr Gilmour. Mr Gilmour was also to assign his rights to the Bridgecorp investment to Decisionmakers. In the event that Decisionmakers recovered in excess of $72,700, it was required to pay Mr Gilmour whatever excess was received.

Duties of financial advisers

[31] Two experts gave evidence, Murray Weatherston for Mr Gilmour and Nigel Tate for Decisionmakers and Mr Hartles. Both experts were broadly in agreement as to today's generally accepted principles of investment. Mr Weatherston, for Mr Gilmour, stated in his brief of evidence read to the Court:

> 24. The generally accepted principles of investment are as follows:
>
> (a) Know about your client and know what his/her objectives are. This includes knowing his/her risk profile and what other sources of income the client may have.

(b) Based on the knowledge of the client, draw up an appropriate portfolio, utilizing the client's resources to achieve his or her investment objectives.

(c) The next step is to establish an appropriate asset allocation for that portfolio.

(i) Asset allocation is how a portfolio is split between the main asset classes; cash, fixed interest, property, equities and alternative assets.

(d) While preparing this asset allocation for the client, you may end up with a conflict between what the client needs to do to achieve his/her objectives and his/her tolerance of risk in the portfolio. If this is the case, then this must be explained to the client and an alternative solution presented to the client. This might be that the client agrees to accept a higher level of risk, or alternatively that a lower risk asset allocation is required that might mean all of a client's objectives are not achievable. That is a compromise is required. A reasonable advisor will ensure that the client receives sufficient advice to make a well-informed decision.

(e) Once asset allocation is determined, a reasonable financial advisor would then choose specific securities to implement the determined asset allocation.

(i) There is no 'one size fits all' rule which can be applied to an allocation and this will be determinative on the knowledge you have of the client.

(f) Within each asset class a reasonable adviser will diversify the assets selected. Diversification is especially important in the case of fixed interest assets because these assets carry an inherent default risk.

(g) Default risk is the risk of losing all your investment if the company fails.

25. To effectively diversify an investment portfolio an advisor would, or should, spread the investment over a number of individual securities and it would be necessary to ensure that each of these securities do not have the same or similar characteristics or risk profile.

26. A reasonable financial advisor would reconsider the client's position each time new money was available to invest. The correct approach would be to take into account the clients existing portfolio and use the new capital to expand and diversify the current investments.

[32] These principles are reinforced by the requirements of r 11 of the Financial Planners and Insurance Advisers Association Inc (now the Institute of Financial

Advisers) Code of Ethics and Professional Conduct, which applied to Association members from 1 March 2002, which provided:

> To ensure that any advice is appropriate and in the best interests of the client, members must have established that advice using reasonable and prudent judgement, after gathering sufficient information about the client's circumstances, level of sophistication, financial position and their objectives. When giving advice, members shall adhere to the provisions of the "Prudent Person Principle" as set out in the Trustee Amendment Act 1988.

[33] In evidence, Mr Tate, for Decisionmakers and Mr Hartles, accepted that around the years 2000 to 2002, although not required to build a risk profile of the investor as it is known today, a prudent financial adviser would have looked at the circumstances, the level of sophistication, the financial position and the objectives of the investor before they gave them advice.[2] He also accepted that a reasonable or prudent financial advisor would re-evaluate his/her client each time they were approached with new funds to invest.[3] In his view, a portfolio made up of 100% fixed interest investments was an unsuitable investment for a retired person such as Mr Gilmour. It was also clearly unsuitable if all a person's investments were in finance companies.[4]

[34] Mr Hartles also acknowledged the importance of this process of ascertaining a client's needs and managing risk through diversification. He stated in his brief of evidence read to the Court:

> **The investor client**
>
> 19. If a prospective client walked through the door and had a sum of money which they wanted to invest but did not know where they wanted to invest or how long they wanted to invest it for, the steps I would take were a seven step process.
>
> 20. The initial consultation lasted for about an hour and was free. After that hour, if they decided to continue with my services, they would engage me to take them through the financial planning process and work out a plan for them they could follow. This was charged for.
>
> 21. The seven-step process was essentially:-
>
> (a) Gather information.

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[2] Notes of evidence page 66, line 25 – page 67, line 7.
[3] Notes of evidence page 68, lines 1-4.
[4] Notes of evidence page 68, lines 5-13.

(b) Identify the investor's goals.

(c) Cash flow management – ie, budgeting.

(d) Risk management.

(e) Preparing the investment plan.

(f) Implementing the plan.

(g) Reviewing the plan periodically.

22. Back in 2000 the average bill for doing all of this was about $500 plus GST. In addition, there would be an implementation fee which would average 2% - 3% of the amount invested.

[35] Mr Hartles did not follow this process in the case of Mr Gilmour. The following exchange took place in the cross-examination of Mr Hartles at trial:[5]

Q. Now, you are a professional financial adviser, aren't you?

A. I'd like to think so.

Q. And your company offers other investment opportunities than just finance companies, doesn't it?

A. Yes.

Q. You provided Mr Gilmour with investment advice, didn't you?

A. I advised him with recommendations on different finance companies.

Q. Did you provide him investment advice?

A. Can I – my, my response to that is that for the normal course of events I would have followed the seven step process of investment advice so we would've done the foundation work. In this situation we didn't – I didn't do that.

Q. So you didn't do your seven step process?

A. No.

Q. You gave him advice, didn't you, yes or no?

A. Okay, yes.

Q. Thank you. You didn't disclose your commission to Mr Gilmour, did you?

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[5] Notes of evidence page 51, line 10 – page 52, line 9.

A. No.

Q. You didn't make any notes on Mr Gilmour's file, did you?

A. I made some notes but not many.

Q. And you've disclosed all the documents that you held on Mr Gilmour's file?

A. Yes.

Q. For a retired person wanting low to medium risk investments investing 100% of their funds in four finance companies would not have been a suitable investment, would it?

A. Well, it was never discussed it was –

Q. - yes or no, in those circumstances?

A. No.

Q. A $100,000 investment in Bridgecorp for five years would not have been a suitable investment for Mr Gilmour, would it?

A. No.

Cross-appeal

[36] I shall deal first with the cross-appeal by Decisionmakers against the order that Decisionmakers pay Mr Gilmour $72,700. It is said that the Judge erred in fact and law in the following ways:

(a) Making the finding that Mr Gilmour wanted to invest in a low to medium risk investment.

(b) Making the finding that the $100,000 investment for five years in Bridgecorp was backed up by diary notes made by Mr Gilmour.

(c) Making the finding that the investment portfolio for Mr Gilmour was inappropriate for Mr Gilmour's purposes and the basis for this finding was reflected by the expert called by Mr Gilmour.

(d) Making the finding that Decisionmakers breached the duty of care to Mr Gilmour and, in particular, the finding that Mr Gilmour was seeking to invest in a low-to-medium risk portfolio.

(e) Making the finding that the conduct by Decisionmakers up to and including the investment of $100,000 for the five year period in Bridgecorp and the $23,000 investment in Property Finance was negligent.

(f) Finding that the breach of duty of care was causative of Mr Gilmour's losses and such losses were foreseeable.

(g) Making the finding that Decisionmakers engaged in misleading or deceptive conduct.

Low to medium risk investments

[37] Counsel for Decisionmakers submits that the Judge's finding that Mr Gilmour wanted to invest in low to medium risk investments was not supported by the evidence and sought to persuade me that I should overturn that finding. It seems to me, however, that the Judge did not make a specific factual finding on the issue of low to medium risk investments as against medium risk investments which was of consequence to the outcome of the case. The Judge's crucial finding is contained in [25] of his judgment. Specifically, he found that Mr Hartles had inadequate information or records about Mr Gilmour. There was also no evidence that Mr Hartles identified Mr Gilmour's goals, discussed budgeting and risk management, prepared an investment plan, implemented such a plan or reviewed it periodically.

[38] The failure to identify Mr Gilmour's goals led to the differing positions as adopted by Mr Gilmour and Mr Hartles at trial. As noted by the Judge:[6]

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[6] At [23](b).

> Mr Hartles' level of assumption about Mr Gilmour's wishes contrasts with Mr Gilmour's evidence that he in fact wanted low to medium risk investments.

[39] The fact that differing positions were adopted at trial supports the Judge's crucial finding about Mr Hartles' failure to identify Mr Gilmour's goals. No specific finding that Mr Gilmour wanted low to medium risk investments was therefore necessary for the Judge's decision.

Diary notes

[40] Counsel for Decisionmakers submits that the Judge was wrong to rely on Mr Gilmour's diary notes to find that Mr Gilmour reinvested $100,000 with Bridgecorp for five years on Mr Hartles' advice.

[41] Counsel correctly notes that Mr Gilmour's diary only recorded an appointment or a telephone number on a particular day and that nothing is recorded about the content of such meetings or telephone conversations. Counsel points to Mr Hartles' evidence that he would not have recommended investing in Bridgecorp for five years because the commission was the same whether it was for two, three, four or five years and he had not placed any of his other clients in Bridgecorp for a term as long as five years.

[42] Again, the Judge made no specific finding about what was said in the conversation between Mr Gilmour and Mr Hartles when Mr Gilmour spoke to Mr Hartles about renewing the $100,000 Bridgecorp investment. The Judge noted that the exact nature of the conversation was subject to differing accounts although he did note that the evidence of Mr Gilmour on the matter (backed by his diary note) was clear while the lack of records kept by Mr Hartles (as the financial adviser who earned commission from the investment) was not helpful.

[43] Counsel submits that the evidence to support the Judge's finding that the $100,000 was reinvested on the respondent's advice was skimpy or completely non-existent, but there is no doubt that there was a conversation between Mr Gilmour and Mr Hartles before Mr Gilmour reinvested the $100,000. Mr Hartles also accepted in

evidence that a $100,000 investment in Bridgecorp was not a suitable investment for Mr Gilmour, but there is no record of any advice that Mr Hartles may have given to Mr Gilmour not to invest that amount of money in Bridgecorp for that length of time. The key to the Judge's finding of negligence is the lack of any financial plan rather than any specific advice to invest in a particular finance company. It was therefore unnecessary for the Judge to make any specific factual finding about what was said in the conversation between Mr Gilmour and Mr Hartles before Mr Gilmour renewed the $100,000 investment of Bridgecorp.

Appropriateness of investment portfolio

[44] Counsel for Decisionmakers submits that the evidence pointed to Mr Gilmour seeking a medium risk portfolio and did not support a finding by the Judge that Mr Gilmour wanted a low to medium risk portfolio. In support of this submission, counsel points to the evidence of Mr Alan Hartles that Mr Gilmour did not want advice but was shopping for product and Mr Tate, the expert for Decisionmakers and Mr Hartles, who felt that Mr Gilmour was either well informed or knew nothing about investments.

[45] This submission is a development of the first point of appeal. If Mr Gilmour was merely shopping for product, then counsel submits it may not necessarily have been inappropriate for Mr Gilmour to have invested all his money in four finance companies.

[46] However, once Mr Gilmour's circumstances had been ascertained, both experts agreed that Mr Gilmour's investment portfolio was inappropriate for him. Mr Weatherston stated in his brief of evidence read to the Court:

> 27. From my review of the circumstances, Hartles/Decisionmakers have failed to act as a reasonable financial advisor would have for the following reasons:
>
> (a) They have not made an overall assessment of the client, therefore they could not have appropriately advised them on the investments.
>
> (b) The asset allocation by Hartles/Decisionmakers appears to be a default one which was not appropriate for Mr Gilmour.

(c) The investments Hartles/Decisionmakers entered Mr Gilmour into did not take into account the client's needs, nor did they address the appropriate risk profile.

(d) A reasonable financial adviser presented with a client in Mr Gilmour's situation, with $100,000 to invest, would not have recommended the entire amount be invested in any one finance company but would have diversified the investment over a number of specific securities to lessen the default risk.

(e) Hartles/Decisionmakers failed to diversify Mr Gilmour's portfolio when he presented new money to invest. This resulted in a portfolio which was not sufficiently diversed.

[47] Mr Tate said in evidence:[7]

Q. And we maybe covering ground you've already covered, but a portfolio which is made up of 100% fixed interest investment is an unsuitable investment for a retired man isn't it?

A. In my view it is, yes.

Q. And just to expand on that. A portfolio with $200,000 and four investment companies would be an unsuitable investment for a retired man wouldn't it?

A. I think that there is a preponderance of too much in the way of finance companies. If, if they're all in finance companies the answer is yes.

[48] The Judge was therefore entitled to make the finding that Mr Gilmour's investment portfolio was inappropriate for his purposes.

$100,000 investment in Bridgecorp for five years

[49] Counsel for Decisionmakers acknowledges that this has already been covered in the point on appeal relating to the diary notes. However, counsel proceeded to submit that the Judge has assumed that just because Bridgecorp failed, this meant that the advice must be negligent. If this is what the Judge assumed, then I would allow the cross-appeal immediately. In my view, however, that is clearly not the case. What the Judge said was:[8]

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[7] Notes of evidence page 68, lines 5-13.
[8] At [25].

> It is clear that Mr Hartles' conduct in relation to Mr Gilmour's investments up to and including the 2003 Bridgecorp reinvestment of $100,000 and the 2006 Property Finance investments of $23,000, was negligent. The result was that Mr Gilmour was left exposed and at risk with an investment portfolio that did not meet his actual needs and was not appropriate for an investor in his position.

[50] The conduct the Judge was referring to was specified in the previous sentence:

> There is no evidence that Mr Hartles identified Mr Gilmour's goals, discussed budgeting and risk management, prepared an investment plan, implemented such a plan or reviewed it periodically.

[51] Even if there was an investment plan in place, both experts agreed that Mr Gilmour's position should have been reconsidered each time he had money available to investment. It was the lack of an investment plan that was held to negligent. Specific advice about investing in Bridgecorp or Property Finance was not necessarily so.

Breach of duty of care causative of losses

[52] Counsel for Decisionmakers submits that if the Court accepts the evidence does not support the Judge's finding that the decision to invest in Bridgecorp for five years was a result of advice from Mr Hartles, then it cannot be said that the loss was caused by Decisionmakers. Again, this is a development of the earlier points on appeal.

[53] The Judge actually found that Mr Hartles' breach of his duty of care to Mr Gilmour materially contributed to Mr Gilmour being deprived of the chance of making prudent and appropriate investments and as a consequence Mr Gilmour was left exposed and at risk with an investment portfolio that did not meet his actual needs and was not appropriate for an investor in his position.

[54] Again, I am of the view that the Judge's findings do not relate directly to the specific decision to invest in Bridgecorp for five years, but to Mr Hartles' continuing conduct in failing to implement an investment plan for Mr Gilmour.

[55] In my view, the Judge accurately referred to Mr Gilmour being in a twilight zone. The initial position adopted by Mr Hartles was that Mr Gilmour was not even his client. In an email to Mr Gilmour dated 22 January 2009, Mr Hartles stated:

> I've only been back this week and I wish to talk to Alan [Hartles] about what file notes he might have which will support my recommendations. At the time you started with me it was after you had just pulled all your money out of AMP managed funds as they were underperforming which was against the advice from Alan as I understand. You were still a client of Alan's and the instructions for your investments came from you and Alan. I was purely providing transactional services on the back of directions from you and Alan. You have always remained a client of Alan's as I was contracted to Alan to work with his clients. Alan is away in Australia this week so if you can wait a little longer I will get whatever notes he has which explains the basis of our relationship and the reasons you proceeded with investing in Finance Co. secured debentures.

[56] Mr Gilmour responded the next day by email as follows:

> Nothing you said in your email including statements about Alan's involvement is correct. My Mother estate included some monies with AMP. During discussions with Alan about this investment it turned out that AMP did not pay interest on a quarterly basis which is what we wanted. Therefore end of my involvement with AMP. Before the interview ended Alan suggested that we may like to consider this proposal which he passed across this desk. "This proposal" was invitation to invest with Strategic and it had your name on it. We followed this up and invested with you. At no time during our association did you ever mention any connection between your self, ourselves and Alan. Any business contracted was always assumed to be with you? I have never been a client of Alan's.

[57] Mr Alan Hartles then wrote to Mr Hartles by letter dated 25 June 2009 as follows:

> Ken Gilmour acknowledged to you that he has never been a client of mine or True North investments and that is correct.
>
> ...
>
> In referring Ken to you, I would not have mentioned the disclosure statement thinking that you would cover this as part of compliance when you met.
>
> There was no written plan or recommendations made after my meeting and therefore he was not on the data base even as a prospect.

[58] In his brief of evidence, Mr Hartles explained why he did not go through the normal seven-step process he outlined for his clients. He stated:

> 28. Having had the referral from my brother, I assumed that they had been through the financial planning process to work out what Mr Gilmour wanted to invest in.

[59] This evidence clearly supports the Judge's finding about Mr Gilmour being in a twilight zone where his adviser had inadequate information or records about his client.

Misleading or deceptive conduct

[60] Counsel for Decisionmakers submits that any recommendation made by Decisionmakers to invest in Bridgecorp or Property Finance represented its honest opinion based on information provided by other people and therefore could not be misleading conduct in breach of s 9 of the Fair Trading Act. Counsel submits that Decisionmakers utilised research from several different sources, including an investment committee in Broadbase and a ratings agency, called Rapid Rating. That being the case then, Decisionmakers cannot be liable for holding an honest opinion based on information provided by other people.

[61] Counsel submits that the Judge was not specific about precisely what is misleading or deceptive. However, if the misleading or deceptive conduct related to advice on the soundness of Bridgecorp and Property Finance, then that advice was honestly held and honestly given.

[62] The Judge adopted the approach to s 9 of the Fair Trading Act taken in *AMP Finance NZ Ltd v Heaven*:[9] The Court is required to ask whether the conduct was capable of being misleading; decide whether the plaintiff was in fact misled by the conduct; and finally decide whether it was, in all the circumstances, reasonable for the plaintiff to be misled by the conduct.

[63] The Judge then referred to the pattern of Mr Hartles' conduct in relation to Mr Gilmour described in paras [3] – [10] and [22] – [23] of his judgment. Although the Judge does refer in those paragraphs to specific advice given to Mr Gilmour, (for

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[9] *AMP Finance NZ Ltd v Heaven* (1997) 8 TCLR 144 (CA) at 152.

example, "Mr Hartles advised that these were still safe and performing well and would remain suitable investments"[10]) it is my opinion that the Judge did not base his finding relating to misleading or deceptive conduct on specific advice given on the soundness of Bridgecorp and Property Finance but rather on Mr Hartles' overall conduct, including Mr Hartles' view that Mr Gilmour was not his client, his assumption that his brother, Mr Alan Hartles, had been through the financial planning process with Mr Gilmour, his view that the services he was providing to Mr Gilmour were merely transactional and his failure to notify Mr Gilmour that he was not responsible for the soundness of any of the investment decisions made by Mr Gilmour for which he was receiving commission as well as his various statements about the suitability of the finance company investments for a person in Mr Gilmour's position.

[64] It is, therefore, my view that there was ample evidence upon which the Judge was able to make his finding of misleading or deceptive conduct on the part of Mr Hartles.

[65] The cross-appeal is accordingly dismissed.

Appeal against deductions

[66] As noted in [26] above, the Judge took two deductions from the sum of $100,000 lost by Mr Gilmour in the collapse of Bridgecorp. Firstly, he deducted 10% from Mr Gilmour's total investment of $123,000 in both Bridgecorp and Property Finance on the basis of expert evidence that a reasonable financial adviser would not have invested more than 10% of the total capital investment in each of Bridgecorp and Property Finance.

[67] The appellant submits that the damages awarded were incorrectly discounted by $2,300 because the Judge did not award Mr Gilmour any damages at all in respect of the $23,000 invested with Property Finance. He submits that only 10% of the $100,000 invested with Bridgecorp should have been deducted. There is no

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[10] At [10].

challenge on appeal to the principle of a deduction on the basis of the expert evidence.

[68] The respondent submits that the mathematics is not incorrect and the calculation is reasonable. There is no cross-appeal on the basis that the Judge should have deducted a larger sum notwithstanding the availability of an argument that the appropriate deduction was 10% of Mr Gilmour's total investment portfolio, which was $278,000 at the time of the rollover of the Bridgecorp investment.

[69] On the basis of the arguments presented to me on appeal, I am of the view that as a matter of principle the Judge should not have deducted $2,300 (being 10% of the $23,000 Property Finance investment) from the damages awarded in respect of the Bridgecorp investment when damages were not awarded in respect of the Property Finance investment. Although there are alternative ways of calculating the appropriate deduction, I take the simple view that, at the time of the rollover of $100,000 in Bridgecorp for a period of five years in 2003, that was the sum that Mr Gilmour had available for investment. Up to 10% of that sum could have reasonably been invested in Bridgecorp. That is therefore the appropriate deduction. The Judge did not find that Mr Gilmour had suffered loss through his other remaining investments in Property Finance.

[70] The second deduction made by the Judge was a further $15,000 (being 15% of the Bridgecorp investment) following the approach taken by the High Court in *Armitage v Church*[11] of discounting the claim for imponderables. The Judge made an assessment of whether, and to what extent, Mr Gilmour would have safeguarded his funds in low to medium risk investments had Mr Hartles' advice met the required standard. On that basis he allowed a further deduction of $15,000 – leaving a final balance of $72,700.

[71] The appellant submits that the Judge had no evidential basis for applying the discount. Counsel says that the case of *Armitage* can be distinguished as

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[11] *Armitage v Church* HC Wellington CIV-2009-485-1952, 27 May 2011 per Dobson J.

Mr Gilmour gave evidence that he was reliant on Mr Hartles and there is no evidence that shows that he would not have followed Mr Hartles' advice.

[72] The respondent submits that the Judge was quite correct to reduce the claim by 15% pointing to Mr Gilmour's initial investment of $28,000 in Strategic Finance in 2000 without seeking Mr Hartles' advice. The respondent submits that the percentage allowed is essentially a discretionary one and is a reasonable deduction given that it is a loss of a chance.

[73] It is my view, however, that the factual situation in *Armitage* was quite different to the present case. In October 2007, three months after the collapse of Bridgecorp, Mr Armitage was corresponding with another financial adviser, and was planning re-investment in other finance companies, once he had withdrawn money from the ING investments made on the defendant's recommendations. By that time, the defendant was recommending against investment in finance company debentures and Mr Armitage commented in an email to the defendant:[12]

> I am also concerned about your recommendation not to reinvest in debentures for the next 12 months. There are Finance Companies which had the foresight to plan for tight trading times, have credible ratings, excellent management, good quality loan books, high levels of liquidity and good credit facilities.

[74] In that case, Dobson J had ample evidence to make an assessment of whether and to what extent Mr Armitage would have safeguarded his funds in low to medium risk investments had the defendant's advice met the required standard.

[75] In the present case, however, it is my view that the Judge had no such evidence. The respondent is only able to point to the initial investment of $28,000 in Strategic Finance without advice from Mr Hartles. However, Mr Hartles contacted Mr Gilmour days after that initial investment, presumably when Strategic Finance advised him of the investment and the payment of commission as the broker through whom the investment was made. Mr Hartles wrote to Mr Gilmour at the time "I look forward to doing more business with you in the future".

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[12] At [213].

[76] On each subsequent occasion an investment was made, Mr Gilmour contacted Mr Hartles for advice. In cross-examination of Mr Gilmour the following exchange took place:[13]

> Q. So in your interaction with Mr Hartles were you extremely reliant on his information or was it more a case of sharing of information or was it a case of him following what you directed?
>
> A. Well, I, I had to follow his information because I didn't know the names of any of the companies that were eventually recommended that I invest in. I had no knowledge of that so I relied on him to direct my investments.

This can be contrasted with Mr Armitage who knew of and had clearly expressed views about finance companies.

[77] In his response to the complaint to the Institute, Mr Hartles claimed that Mr Gilmour was an astute businessman and an experienced investor. Mr Hartles said that Mr Gilmour would have been well aware that finance company debentures were high risk investments with a far greater chance of default compared with bank term deposits. This was not, however, borne out in the evidence at the District Court hearing. Mr Hartles acknowledged that he may have falsely assumed that because Mr Gilmour had invested with Forsyth Barr and he had been to see his brother that he would have gained some experience from these meetings and from those situations.[14]

[78] In my view, there was insufficient evidence for the Judge to have concluded that Mr Gilmour may not have safeguarded his funds in low to medium risk investments had Mr Hartles' advice met the required standard and that an appropriate percentage to discount the award of damages was 15%.

[79] Accordingly, the appeal as to deductions made by the Judge is allowed. The proper quantum of damages is $90,000, being the loss of the Bridgecorp investment less 10%.

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[13] Notes of evidence page 32, lines 14-20.
[14] Notes of evidence page 61, lines 17-21.

Personal liability of Rodney John Hartles

[80] The appellant submits that the Judge was wrong to not find Mr Hartles personally liable under the Fair Trading Act. He submits that Mr Hartles personally advised Mr Gilmour on his investment portfolio, was at all relevant times the sole director of Decisionmakers, and was the only person from Decisionmakers that dealt with Mr Gilmour.

[81] The appellant points to the findings of the Judge that:

(a) Mr Hartles' conduct was capable of misleading Mr Gilmour;

(b) Mr Gilmour was misled by Mr Hartles' conduct;

(c) It was reasonable for Mr Gilmour to be misled by Mr Hartles' conduct;

(d) Mr Hartles' breach of the Act caused loss to Mr Gilmour; and

(e) Mr Hartles' breach materially contributed to Mr Gilmour being deprived of the chance of making prudent and appropriate investments.

[82] The appellant submits that these findings were sufficient for Mr Hartles to be personally liable.

[83] While acknowledging that a person in the position of Mr Hartles may be able to be found personally liable under the Fair Trading Act, the respondent submits that any representations made by him cannot be a breach of s 9 of the Act because the Act can only apply to statements made about the viability of a company, such as Bridgecorp. He submits that the Act cannot apply to assessing a person's risk profile because such an assessment does not qualify as a statement made or a representation.

[84] In his judgment, the Judge noted that when Mr Gilmour first contacted Mr Hartles, Mr Hartles operated a business called Broadbase. In April 2006 this

company became Decisionmakers. The Judge quoted the Court of Appeal in *Trevor Ivory v Anderson*[15] that:

> [I]t behoves the Courts to avoid imposing on the owner of a one-man company a personal duty of care which would erode the limited liability and separate identity principles.

[85] The Judge noted that throughout the dealings between Mr Gilmour and Mr Hartles, Mr Hartles made it clear that he was employed by the company then operating. The first document sent by Mr Hartles to Mr Gilmour was on a compliments slip clearly marked "Broadbase Waikato Limited". Subsequent documentation involving Mr Hartles was to the same effect. He also noted that Mr Gilmour himself was aware that Mr Hartles was representing a company as is reflected in Mr Gilmour's letter of 5 October 2004, addressed to "Broadbase Waikato Limited". The Judge could find no assumption of personal responsibility by Mr Hartles and therefore held that liability in the case should rest with Decisionmakers alone.

[86] With respect, I differ from the conclusion reached by the Judge. Firstly, I am of the view that the Judge does not appear to have differentiated between the negligence and the Fair Trading Act causes of actions when assessing Mr Hartles' personal liability. The Judge referred to page 28 of the Court of Appeal decision in *Body Corporate 202254 v Taylor*[16] when concluding that Mr Hartles should not be held personally liable. However, the discussion referred to at 28 of *Taylor* sets out the test for personal liability for negligence. The test for liability under s 9 of the Act is quite separate. It is referred to in the same judgment at 42 – 43.

[87] Secondly, I agree with the appellant that the Judge's findings were sufficient for Mr Hartles to be personally liable. *Taylor* makes it clear that an employee may be personally liable under the Act for statements they make in the course of employment and no assumption of responsibility is required. *Gloken Holdings Limited v The CDE Company Limited*[17] is also authority for the proposition that where a person is the manager or director and where the breach of the Fair Trading

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[15] *Trevor Ivory v Anderson* [1992] 2 NZLR 517(CA) at 523.
[16] *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17.
[17] *Gloken Holdings Ltd v The CDE Company Ltd* HC Hamilton CP28/95, 24 June 1997.

Act is theirs, they can be considered the "alter ego" of a company and will be personally liable. A director who participates directly in his or her company's business will not ordinarily be able to avoid liability under s 9 of the Act and such representations must be regarded as in trade for the purpose of the liability under s 9.

[88] I am of the view that Mr Hartles, as the sole director of Decisionmakers, personally advised Mr Gilmour. Mr Gilmour dealt with no one else. Under the *Gloken* principle, he is the alter ego of the company and should be responsible personally for the statements he made that were held to be misleading. As noted above in [63], the Judge did not base his findings relating to misleading or deceptive conduct on specific advice given on the soundness of Bridgecorp but rather on Mr Hartles' overall conduct, which included various statements about the suitability of the finance company investments for a person in Mr Gilmour's position.

Conclusion

[89] The appeal is allowed on the basis that the correct quantum of damages is $90,000 without any deduction for the Property Finance investment or imponderables. In addition to judgment against Decisionmakers, judgment is also entered on appeal against Mr Hartles personally. The cross-appeal is dismissed.

[90] Costs are to follow the event. If counsel are unable to agree, I will receive memoranda.

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Woolford J