BUDDLE FINDLAY

Legal update - Building Reports – not so weathertight after all?

Daniel Kelleher, Charlotte von Dadelszen, Stephen Whittington, John Buchan, Mark Odlin, Mel Easton, Blake Cescon, Bassam Maghzal, Julia Gabrielle

3 October 2014

The perils and pitfalls of building reports in modern property transactions.

In the wake of an estimated 42,000 leaky homes built in New Zealand during the 1990's and early 2000's, commissioning independent building reports that detail weathertight issues before selling or purchasing a property is now standard practice for the prudent purchaser and increasingly, the responsible vendor. However, commissioning a building report is not an infallible way to ensure that a property is sound. Nor will a building report provide blanket insurance should weathertight issues with the property be uncovered later.

Terms and conditions within building reports often restrict users of report findings, making it impossible for some parties to place any legal reliance on the report content. Further, there are no guarantees that building reports are factually accurate, leading to later misrepresentation claims against building inspectors should a building present with weathertight issues following sale. At times, different building inspector companies can even report contrasting findings on weathertight issues regarding the same property.

Against this background, can a property purchaser rely on a building report or should the caveat emptor principle of 'buyer beware' apply? Can a vendor be liable for the contents of a commissioned building report should the content be misleading? Two recent High Court decisions discuss the issues associated with building reports, and highlight practical implications for parties to property transactions.

Body Corporate 90315 & Ors v Redican Allwood Limited [2014] NZHC 1212 [30 May 2014]

Background

Wellington City Council (WCC) is being sued by a property owner for damages following the sign-off WCC gave to an apartment building (which is a leaky building) in Drummond St, Wellington. In this case, WCC sought to advance a third party claim that damages ought to be paid by RealSure Ltd (a building inspector company) which provided the purchaser of the property with a building report prior to the sale and purchase going unconditional.

The report was issued subject to terms and conditions which included:

- Limiting the use of the report to the person for whom it was prepared
- Offering no guarantee that the property meets weather tightness standards (requiring a separate report to be commissioned to get full assurance in this area).

Ms Patchett signed the sale and purchase agreement, commissioned the report from RealSure Ltd, then incorporated Rastros Ltd as the purchasing entity to purchase the property. Upon settlement, Rastros Ltd was the registered proprietor.

WCC believed that RealSure Ltd and the individual who carried out the inspection and wrote the report (Mr Higgins) should be liable for damages because:

- While the report was specifically prepared for Ms Patchett, Rastros Ltd still has a contractual relationship with RealSure Ltd
- The report contents amounted to negligent misstatement

- The report was misleading and deceptive causing loss to the property owner as per the Fair Trading Act 1986
- Mr Higgins should be personally liable for the contents of the report as there was specific reliance by the property owners on Mr Higgins.

RealSure Ltd claimed that the report was never intended for use by another person or entity other than Ms Patchett, and that the report was not misleading, deceptive or negligent. Therefore, RealSure Ltd believed the claims against it and Mr Higgins ought to be struck out.

Was there a contractual relationship between RealSure Ltd and Rastros Ltd?

The Court found that Rastros Ltd did not have a contractual relationship with RealSure Ltd. This is because there was no agency relationship between Ms Patchett and Rastros Ltd which would give Ms Patchett authority to bind Rastros Ltd because at the time that the report was commissioned, Rastros Ltd did not exist. There was also no evidence that a pre-incorporation contract situation under section 182(1)(b) of the Companies Act 1993 could apply as there was no evidence that Ms Patchett intended to incorporate a company to purchase the property at the time that she signed the sale and purchase agreement, nor was section182(1)(b) applied within a reasonable time period. Finally, rights to the report were not assigned from Ms Patchett to Rastros Ltd because the terms and conditions in the report specifically prohibit assignment to another person.

Was a negligent misstatement claim against RealSure tenable?

For a claim of negligent misstatement to be successful, it must be proved that RealSure Ltd foresaw or ought to have foreseen that Rastros Ltd would reasonably rely on the report. The Court found that there was nothing in the report that was negligent. Further, it was clear in the terms and conditions of the report that no other person other than Ms Patchett could rely on the report. The Court found that it would be unreasonable to find that RealSure Ltd would foresee that Rastros Ltd or any other party would rely on the report.

Is a Fair Trading Act 1986 claim against RealSure tenable?

The Court held that a Fair Trading Act 1986 claim would not succeed in this case because nothing in the report was objectively likely to mislead the reader. The report identifies that there are potential weathertight issues that require further specialist inspection which did not occur. The report findings could not reasonably be said to be an operative cause of Rastros Ltd's loss as the owner of the property.

Is Mr Higgins personally liable for negligent misstatement or under the Fair Trading Act 1986?

Even if negligent misstatement or Fair Trading Act 1986 claims were successful, Mr Higgins would not be personally liable as an ordinary worker of RealSure Ltd. Generally only employees in senior controlling positions or directors will be personally liable for negligence or providing misleading material.

In practice

If a purchaser knows that they wish to nominate a purchasing entity to be the registered proprietor of a property, at the time of commissioning a building report, they must tell the building inspector to address the report to both the purchaser and the future purchasing entity. This will allow the purchasing entity to rely on building report findings should weathertight issues emerge post registration. Obviously, in this case the fact that Ms Patchett had not taken this step actually helped her.

If the building report provides that further investigation or reporting is required to certify that there are no weathertight issues, the prudent purchaser should request this further investigation.

Edwards and Edwards v Cull and Cull [2014] NZHC 1556 [1 July 2014]

Background

Mr and Mrs Cull decided to sell their property. Upon the advice of their real estate agent 'Unlimited Potential', the Culls commissioned a building report from a building inspection company called Dwell Healthy Homes Ltd. The Dwell report gave a strong indication that the property had no weathertight issues. The building report was given to prospective purchasers as part of the property's marketing campaign.

Mr and Mrs Edwards were interested in purchasing the Culls property. Upon reading the Dwell report provided by Unlimited Potential, the Edwards decided to commission their own building report from Able Inspections Ltd. Able reported water ingress and high moisture levels in walls of the property. The Edwards gave Able's report to the Culls to respond.

The Culls showed Able's report to Dwell. Dwell replied in a letter refuting the findings of Able's report, stating that Able's moisture readings were 'bogus' and questioning the competency of Able employees as housing inspectors. Dwell also commented that Able's findings were only upsetting the parties involved with the sale and purchase.

The Edwards saw the letter from Dwell, and believing that there were no significant weathertight issues, purchased the property from the Culls in March 2011. In 2013 the Edwards discovered that the property had significant water ingress costing an estimated $750,000 to remedy.

The Edwards have sued a number of parties in an attempt to regain losses suffered, including bringing an action against the Culls claiming damages for misrepresentation under section 6(1) of the Contractual Remedies Act 1979 (CRA). The Culls have applied for a summary judgement against the Edwards that the letter and report provided by Dwell is not a misrepresentation for the purpose of section 6(1) of the CRA.

In this case, the Court was to determine whether the summary judgment application could be granted, and in doing so, consider whether the Edwards have an arguable case against the Culls for misrepresentation under the CRA.

Whether the alleged misrepresentations were made by or on behalf of the Culls?

For a misrepresentation claim under the CRA to be successful in this instance, it must be established that the claims that the property did not have weathertight issues were made by the Culls or on the Culls behalf.

The Culls argued that the report and letter issued by Dwell could not be attributed to the Culls through agency. Instead they maintained that they only passed on a statement made by Dwell without personally endorsing it.

However, the Court found that it is arguable that an agency relationship between the Culls and Dwell existed. This was because Dwell had gone beyond the point of a disinterested expert invited to supply information and had, instead, become actively involved in selling the property (as evidenced by Dwells statements regarding the sale and purchase of the property).

Whether the reports given by Dwell were statements of opinion?

The Culls claimed that the statements relied upon by the Edwards were only statements of opinion. In law, if the facts of a situation are equally known to both parties to a contract, then what one party says to another is only opinion and not fact. Therefore, the Culls believed that as neither the Edwards nor the Culls are property inspection experts, any communication between them can only be opinion not fact. A misrepresentation will not be found where opinion is expressed.

The Court found that once it can be established that Dwell acted as an agent of the Culls in the creation of the report and letter, then the statements made by Dwell bind the Culls as principal of Dwell. Dwell is an expert in property inspection and knew more about property inspection than the Edwards. Therefore, it is unlikely that the Dwell reports will be found to be mere opinion, but whether there is a factual basis to the reports is a trial issue.

Overall, the Court found that the Edwards have an arguable case against the Culls for misrepresentation under section 6 of the CRA and the summary judgment application was dismissed.

In practice

If a vendor commissions a building report to be made available to potential purchasers of a property, the vendor and the real estate agent should not endorse the findings of the building report in order to encourage a sale. The building report should be offered as an independent report that purchasers can consider when deciding whether or not to purchase the property. The vendor and agent should make no further comment on any report.

Auckland

188 Quay Street
Auckland 1010

PO Box 1433
Auckland 1140
New Zealand

P: +64 9 358 2555
F: +64 9 358 2055

Wellington

Aon Centre
1 Willis Street
Wellington 6011

PO Box 2694
Wellington 6140
New Zealand

P: +64 4 499 4242
F: +64 4 499 4141

Christchurch

83 Victoria Street
Christchurch 8013

PO Box 322
Christchurch 8140
New Zealand

P: +64 3 379 1747
F: +64 3 379 5659