

Vendor liability for innocent misrepresentation and undiscovered weathertightness defects – *Grant v Ridgeway*

Whether vendors should be liable for innocent misrepresentation and undiscovered weathertightness defects in the sale of existing homes is a controversial question currently eliciting differing responses in the Courts. The question typically arises after a buyer settles a house purchase and then discovers error in the information provided by or on behalf of the vendor, or major weathertightness and/or other defects in the property. In a recent case, *Grant v Ridgeway Empire Limited* [2018] NZHC 2642, a buyer succeeded in a case against the vendor when post-sale expert investigations revealed extensive weathertightness defects and damage.

The facts

Ridgeway Enterprises Limited (REL) through its director, Mr Ridgeway, had owned four of five townhouses in a complex in Hauraki, Auckland at various times between 2003 and 2016.

In 2004, REL had undertaken a kitchen alteration to Unit 4 which revealed that water ingress was occurring through the third floor deck above. This resulted in the deck membrane being replaced.

In 2009, REL put Unit 4 up for sale. Ms Grant was an interested purchaser. Aware of the leaky building syndrome in New Zealand, Ms Grant directly asked Mr Ridgeway prior to purchase whether the house was leaky. Mr Ridgeway told Ms Grant that it was not. Ms Grant proceeded to complete the purchase.

In mid-2011, Ms Grant noticed leaking in the ceiling of the second-floor lounge

ceiling and engaged an expert to investigate further.

Between mid-2011 and mid-2012, expert investigations revealed extensive defects and damage that showed clear signs of water ingress that had been occurring over a long period of time.

Over the subsequent 3 years, extensive remedial work was undertaken.

During the course of remedial work, timber that was date stamped November 2009 was found in the ceiling of unit 5's garage below Unit 4's deck, indicating that building work had been undertaken to repair decayed timber.

The claim

Ms Grant filed a statement of claim in August 2015 against REL for pre-contractual misrepresentation by Mr Ridgeway in responding to the question of whether the house was leaky in the negative, and for breach of the vendor warranty provisions in the sale and purchase agreement for undertaking building work which required a building consent and for which no consent was obtained.

The findings – Misrepresentation

A misrepresentation is usually a false statement of fact rather than opinion, unless that opinion is not honestly held or implies other statements of fact which are false. Under section 35 of the Contract and Commercial Law Act 2017, an action for damages for misrepresentation will arise if a party is induced to enter into a contract as a result of a misrepresentation made by

or on behalf of another party to the contract.

The Court found that Mr Ridgeway's response to the question of whether the house was leaky was a representation of fact, rather than opinion. It was not qualified by reference to Mr Ridgeway's experience at the property – for example, if he had said "I have never experienced any leaks" – and could reasonably be understood to be a statement of fact that the Unit did not leak.

After establishing that the statement made was a statement of fact rather than opinion, the Court then looked to whether it was reasonable for Ms Grant to rely on the representation made and whether Ms Grant had been induced to enter into the contract as a result of this representation.

In an earlier case of *La Groux v Cairns*, the question was raised as to whether it was unreasonable for a purchaser with access to advice to rely on a representation that a house was not leaking from a vendor who was a recent owner of the property with no particular expertise in leaky homes.

The Court found that if the vendor had stated "*I have experienced leaks in the past but they are all fixed and as far as I know there is no current issue with leaks*" in response to a question about the present situation, then this argument may have succeeded.

However, where a vendor simply responded in the negative when asked if the house leaked, the purchaser was

found to be entitled to rely on the vendor's representations.

In *Mason v Magee* however, the Court of Appeal found there was no misrepresentation where the vendors responded to the question "*is this a leaky home?*" by saying "*absolutely not, we have never had any issues with this house*".

The Court found that Ms Grant was entitled to rely on Mr Ridgeway's representation – it was an unqualified statement of fact, made by a vendor who had superior knowledge and means of obtaining knowledge about the property than Ms Grant.

It did not matter that Mr Ridgeway may have believed the truth of his statement – at the time of sale, Mr Ridgeway may have thought that all leaks had been repaired and the house was no longer leaky. However, the representation made was that the house was not leaky as a statement of fact without any qualification. This representation turned out to be incorrect.

Intent to deceive is not an element of a cause of action for innocent misrepresentation.

Ms Grant relied on this representation and the Court found that the representation would have had a material effect on Ms Grant's decision to proceed with the purchase and induced her entry into the agreement for sale and purchase. As such, Ms Grant succeeded on her claim in misrepresentation.

The findings – Breach of Vendor Warranties

The standard form ADLS sale and purchase agreement contains vendor warranties which include a provision that the vendor warrants that for any building work undertaken at the property that required a building consent, a building consent was

obtained, and the work was completed in accordance with that consent.

Under the Building Act 1991 which was in force in March and April 2004, a building consent is required where the works involve the repair or replacement of any component which has failed to satisfy the provisions of the building code for a period specified as the component's durability period. One such performance requirement is under "E2" in relation to keeping out external moisture.

In Ms Grant's case, the claim for breach of vendor warranties was in relation to the replacement of the deck membrane in 2004 which was undertaken to address the ingress of water. Counsel for Ms Grant argued that the deck membrane had failed to perform E2 to the required durability period of 50 years given the deck's contribution to the structural behaviour of the building. In the alternative, Counsel for Ms Grant argued that the deck had leaked within the 15 year durability period should the Court find this to be relevant durability period.

The Court found that the deck had failed to perform to E2 standard.

However, the Court then went on to find that the durability requirement for the deck membrane was 15 years, and as the deck was originally constructed in 1983, the durability period would have expired in 1998. On the evidence available, the Court was not able to find that the membrane had failed within this period.

As such, the Court found that Mr Ridgeway was not in breach of the vendor warranty provisions.

Conclusion

Caveat emptor, a doctrine founded on the presumption that a buyer is competent to protect her own interests still governs most sales of goods and real estate. Under this doctrine, a vendor is generally protected from liability for the sale of defective

property, unless they made the sale under express misrepresentation, whether innocent or fraudulent.

However, unless a statement is known to be factually correct, care should be taken to qualify the basis for any statements made. For purchasers receiving information about a property from a vendor, it is important that these qualifications or statements of experience are assessed with a grain of salt – there is no substitute for undertaking your own due diligence to satisfy yourself of the current condition of the property or propensity for future issues.

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