Legal Update

17 February 2021

Property misrepresentation claims – *Anderson v De Marco*

A seller who misrepresented the condition of the property has been ordered to return the $120,000 deposit and pay damages, interest, and expert and legal costs to a buyer misled about its weathertightness problems and history of repair work. Partner Stuart Dalzell, Associate Bridget Lambert and Solicitor Dimitri Viatos acted for the successful plaintiffs.

In a recent decision in the matter of *Anderson v De Marco*,[1] the High Court assessed whether the Andersons were justified in cancelling their contract to purchase a residential property in Wellington on the grounds of misrepresentation and breach of vendor warranties.

The findings on breach of vendor warranty are particularly of interest as marking the first finding by the High Court where a breach of the standard ADLS vendor warranty provisions met the requirement for 'substantiality' for cancellation under s 37(2) of the Contract and Commercial Law Act 2017 (CCLA).

Facts

In late 2017, Dr Anderson and Ms Carrasco (the Andersons) entered into an unconditional agreement to purchase a property in Karaka Bay, Wellington from Mr De Marco. A deposit of $120,000 was duly paid, with settlement set to occur in May 2018.

Prior to purchase, the Andersons were provided with various documents from the vendor's agent, including a building inspection report and 'disclosures' document.

The building inspection report made statements such as "*Is the dwelling a "leaky home"? No*", the house is a "*dry occupancy*" and that the house meets E2[2] and B2 under the Building Act 2004.

The disclosures document identified two items of work that had been completed at the property (replacement of the roof over the lounge and replacement of butynol on the deck). Prospective purchasers were referred to the building inspection report regarding the condition of the house.

Shortly before settlement day, the Andersons received an anonymous phone call advising that the property suffered from extensive weathertightness issues and that building work had been undertaken in attempts to repair the property.

Further investigation uncovered a building inspection report that the vendor had obtained in 2011 and quotes/invoices for building work at the property. The 2011 building inspection report outlined weathertightness concerns about the property, including photographs of decayed timber viewed from the subfloor. A quote for work described the replacement of cladding and reformation of window junctions with "no guarantee for weathertightness".

The purchasers withheld settlement and sought an explanation from the vendor. None was forthcoming, and the vendor made demand for settlement to proceed.

On 6 June 2018, the Andersons cancelled the contract for misrepresentation and breach of contract. A claim was subsequently filed for return of the deposit plus consequential losses.

Cancellation of contract

Section 37 CCLA provides for cancellation of contract for misrepresentation and breach. Under s 37(2), the claiming party must prove that the term breached was an essential term of the contract (or the truth of the representation was essential), or that the effect of the breach/misrepresentation substantially alters the benefit or burden of the contract. Therefore once breach or misrepresentation is established, the claiming party must prove the essentiality/substantiality of the breach or misrepresentation.

Findings – Misrepresentation

The Court found that by referring prospective purchasers to the building inspection report as to the condition of the property, Mr De Marco represented that there had been a comprehensive assessment of the property by an expert. The expert report in turn represented that the property was in good condition, met building code requirements and there were no apparent weathertightness issues.

The statement in the disclosures document referring prospective purchasers to the building inspection report was considered to represent an 'endorsement' of the report by the vendor. I.e. That the report was accurate to the best of the vendor's knowledge and belief, or he otherwise had no reason to doubt the veracity of that report.

On the facts, the Court had little hesitation in finding that the representations were plainly not true. Concerns about weathertightness issues at the property had been raised with the vendor on a number of occasions prior to sale but had not been resolved (or disclosed) prior to sale. Mr DeMarco had not told the report writer

[1] *Anderson v De Marco* [2020] NZHC 2979

[2] *E2 – External Moisture, B2 – Durability of the New Zealand Building Code*

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about earlier, adverse advice or asked him to comment on it.

The disclosures were found to be 'materially incomplete' and accordingly involved significant misrepresentations about the condition of the property and extent of weathertightness work required at the property.

The requirement to prove 'inducement' into the contract and 'reasonable reliance' on the misrepresentation was met in the circumstances, despite the vendor's suggestion that the Anderson should have been aware of the risks of monolithic buildings and obtained their own building inspection report. In particular, the Andersons had little knowledge of weathertightness issues in New Zealand monolithic homes built in the 1990s, and were not experienced purchasers.

Of interest, the Judge noted:

"It does not lie well in a vendor's mouth to say it is unreasonable for a purchaser to rely on a report that the vendor has provided to describe the condition of the property in circumstances such as the present case, even when there is an accompanying recommendation to obtain their own".

Findings – Breach of vendor warranty

Standard ADLS sale and purchase agreements often contain a warranty from the vendor that a building consent was obtained for any work undertaken by or for the vendor that required a building consent.

A building consent is required for building work where that work is to address a failure of a building element to meet the performance requirements of the Building Code. This is an inherently fact specific exercise, but often work done to address leaky buildings (such as the replacement of rotten structural framing timber) involves a failure to meet the external moisture and durability requirements of the Building Code, and therefore requires a building consent

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Any building consents for such work are required to be shown on the Council LIM report, so as to alert potential purchasers of the building work that has been completed.

In this instance, no building consents were listed in the LIM report for building work undertaken whilst the property had been owned by the vendor.

A number of witnesses gave evidence at the hearing however of building work undertaken at the property to address water ingress issues. In particular, there was evidence of rotten timber framing in exterior walls and the deck/ceiling that had been replaced and invoices for the replacement of exterior cladding sheets and reformation of window junctions.

The Court found that a consent was required for this work and therefore there had been a breach of the vendor warranty provision. The question became whether the vendor warranty provision was essential to the parties, or whether the breach would substantially alter the benefit/burden of the contract.

Although the vendor warranty provision was not found to be an essential term of the contract, the Court found that the effect of the breach meant that the property was worth significantly less than that warranted (therefore meeting the 'substantiality' requirement).

Had a consent been obtained for the building work that was undertaken, the Council would likely have required the wider weathertightness issues to be addressed. As no consent was sought or obtained, the property remained in a 'compromised state' of lesser value than that warranted by the vendor. The Court found this was sufficient to justify the cancellation.

The Andersons were awarded the return of their deposit, plus interest, expert and legal costs.[3]

Bridget Lambert

[3] A question over the ability to claim legal costs incurred prior to filing of the proceeding was resolved, in the plaintiffs' favour, in a subsequent judgment of Cooke J – [2020] NZHC 3490