

High Court holds disclaimer in pre-purchase report effective to exclude liability to third party

In *Body Corporate 90315 v Redican Allwood Limited* [2014] NZHC 1212 a pre-purchase building inspector successfully defended claims for alleged negligent misrepresentation and breach of the Fair Trading Act 1986, by relying on a disclaimer that the report could not be relied on by any third parties.

*Stuart Dalzell, Partner and Richard Hutchison, Solicitor explain.

Background

Ms Pratchett entered into an agreement to purchase a unit in an apartment block. A condition of the agreement was that she would get a builder's report. She contacted RealSure Limited ("RealSure") who inspected the unit and prepared a report. After receiving the report Ms Pratchett confirmed the agreement to purchase. However, instead of purchasing the unit herself, Mr Pratchett and her husband incorporated a company, Rastros Ltd ("Rastros"), which purchased the unit. The apartment block leaked, and the owners sued those who constructed it and the Wellington City Council ("the Council"). The Council applied to make a "third party claim" against RealSure, on behalf of Rastros. A "third party claim" is a claim by a defendant in proceedings (here, Council), claiming that another new party being brought in (here, RealSure) is responsible for or should contribute to the plaintiff's damages against the defendant. RealSure applied to strike out the claim.

The terms of the agreement with RealSure

What was essential in this case was the terms on which RealSure had agreed to prepare the report. RealSure's terms and conditions contained a disclaimer, which stated: "The contents of this report ... is confidential and has been prepared solely for you and shall not be relied upon by any third parties. We accept no responsibility for anything done by any third party in reliance ... on any of

the contents of the report." The report itself stated that it could not give any waterproofing guarantee, and strongly recommended a further report on weathertightness issues.

The Council claimed that RealSure's report breached the Fair Trading Act as it amounted to misleading or deceptive conduct in trade, and that the report contained negligent misstatements.

RealSure had no contract with the unit owner

The first question the Court looked at was whether RealSure had a contract with Rastros as the unit owner. This was an important question as it helped to define the relationship between Rastros, the party who suffered loss, and RealSure, the party whom the Council claimed to have caused some of the loss.

The difficulty for the Council was that RealSure contracted with Ms Patchett before Rastros was incorporated. The Court found that Ms Patchett could not have been acting as Rastros's agent, because Rastros did not exist when she dealt with RealSure. The Council also argued that Ms Patchett had the right to assign the benefit of the contract with RealSure to Rastros. This would mean that the disclaimer would not matter, as Rastros would no longer be a third party to the contract, but be in Ms Patchett's position. However, the Court found that the disclaimer prevented Ms Patchett from assigning the benefit of her contract to Rastros, as such an assignment would clearly be against the purpose of the disclaimer.

Rastros had no negligent misstatement cause of action against RealSure

In order to show that RealSure could be liable to Rastros for any negligent statements it made, the Council first had to show that RealSure owed Rastros a duty of care. This required them to establish that RealSure had assumed responsibility to Rastros,

and that it was reasonable for Rastros to rely on RealSure's statements. However, the Court found that could not be the case here, because RealSure had assumed no responsibility to Rastros, and it was unreasonable for Rastros to rely on the report. There was no way that a confidential report which excluded liability to third parties could give rise to a duty of care to a third party.

Rastros had no Fair Trading Act cause of action against RealSure

In order to show a cause of action under the Fair Trading Act, the Council first had to establish that it was objectively reasonable for Rastros to be misled in all the circumstances. Again, the cause of action failed because of the disclaimer. The Court noted that in the Fair Trading Act context disclaimers are less effective than in negligence. However, in this case the disclaimer was very clear, and the report expressly excluded responsibility in relation to weathertightness. Therefore, the Court held, a reasonable person in Rastros's position would not have been misled into thinking that the property was weathertight.

Conclusion

This case is an important example of how effective disclaimer clauses can be. Because the building report was not prepared for the owner of the unit, the claim did not even get off the ground. This is a reminder that if people rely on a builder's report prepared for someone else, even a related entity, they may not be able to sue the writer of the report if it turns out that the report is faulty.

It also shows some of the risks that arise when using companies to purchase properties. Had Ms Pratchett obtained RealSure's agreement that its report could be relied on by Rastros or a company to be incorporated there may have been a different result.