

Leaky home purchasers succeed in misrepresentation claim against Vendors: *Mason v Magee*

Parker & Associates acted for the successful plaintiff purchasers, Mr and Mrs Mason, in *Mason v Magee* [2017] NZHC 51. The decision is an important one for both buyers and sellers of 'leaky homes' ¹

Background

The Masons first became aware that the property was on the market in September 2011.

In October 2011, the plaintiffs and the defendant vendors attended a dinner party hosted by mutual friends. At that dinner party, the plaintiffs and defendants discussed the property. During discussions, Mrs Magee was asked by one of the attendees "*is it a leaky home*". Her response was emphatically "*no, no, no. It is not a leaky home*" (or words to that effect).

The following day, the plaintiffs attended the property with the vendors for a private viewing. Mrs Mason recalled again asking whether the property was a leaky home. The plaintiffs were told "*no, it is not a leaky home*" (or words to that effect).

The plaintiffs decided to purchase the property from the defendants in December 2011.

The sale agreement was conditional on a building inspection, amongst other things. The pre-purchase inspection report did not raise any issues of concern and the agreement was confirmed unconditional.

Within 6 months of moving into their new home, the plaintiffs became aware of several leaks which were initially thought to be minor but became progressively worse. Expert investigations revealed significant and widespread weathertightness defects

and damage, necessitating a full re-clad.

The plaintiffs filed proceedings against the defendant vendors in misrepresentation, and against the building inspection company in negligence and for breach of the Fair Trading Act 1986. The claim against the pre-purchase inspector was settled. The claim against the vendors proceeded to hearing.

Misrepresentation

A misrepresentation is a statement of fact (rather than opinion) which is untrue. The defendants conceded that, if the alleged representations were made, they were statements of fact rather than statements of opinion.

The Court found on the balance of probabilities that the representations alleged were made and that the representations were untrue. The alleged statements were therefore misrepresentations.

The Judge found that the misrepresentations induced the plaintiffs into purchasing the property, thereby causing them to suffer loss. The fact that the plaintiffs had obtained a pre-purchase inspection report did not negate their reasonable reliance on the defendants' assurances that the property was not leaky. In fact, the Judge found that the social setting where the misrepresentations were made resulted in greater expectations of honesty.

Although the misrepresentations were made at a relatively early stage in the development of negotiations and the relationship between the parties, the representations were made on the *continuum of contractual negotiations*. The defendants admitted they were

promoting their home to the Masons for sale and definitively told the plaintiffs that the property was not a leaky home, whereas the plaintiffs were exploring the prospect of purchase and were anxious to confirm the property was not leaky. In all the circumstances, the Court found the plaintiffs were induced, and it was reasonable to be induced, into purchasing the property by the defendants misrepresentations.

Damages

The Judge awarded the plaintiffs damages on a loss of value basis. While the Masons were fond of the property and its location, given the availability of substitute properties, the Masons' 'love/hate' relationship with the property and fact that repair costs would significantly exceed the value of the property once remediated, the Court found loss of value was fair and reasonable between the parties. The plaintiffs were also awarded their consultants' costs, cost of sale (moving costs, agent's fees, legal costs for sale) and general damages in the amount of \$25,000. The damages award was reduced by \$68,000 to reflect the recovery already achieved from the pre-purchase inspector.

Concluding comments

Overall, the judgment is an important one for both vendors and purchasers.

The leaky home crisis remains a significant issue nationwide, with many homeowners continuing to find that they own a leaky building. Claims against construction parties are increasingly captured by a 10 year limitation defence (which bars claims in respect of acts or omissions occurring more than 10 years before a

¹ Parker & Associates act for the plaintiffs. We note that it is still to be confirmed if the decision will be appealed.

claim is filed), however vendor liability issues continue to arise.

An important feature of the misrepresentations made was the defendants' unequivocal response to the question "*is it a leaky home*". The defendants definitively told the plaintiffs that, no, the property was not leaky. They did not say "*I don't think it is leaky*" or "*as far as I know it is not leaky*".

Mason v Magee confirms the importance of vendors ensuring that any information provided is accurate and appropriately qualified. An untrue statement, even if made innocently, can give rise to an actionable misrepresentation if it induces a purchaser to buy a property.

If you would like any more information about this case, please feel free to contact us.