

## Pre-sale report disclaimer no defence for building inspector's misleading report

In *Steel v Spence Consultants Limited & Another* (identified as [2017] NZHC 398), the High Court rejected a building inspector's argument that his liability was limited by the disclaimer clause attached to the original report, and found him personally liable for losses.

\*Stuart Dalzell, Partner and Rebecca Richter, Law Clerk, discuss the decision.

### Background facts

The building inspector, a Mr Spence of Spence Consultants Limited, undertook a pre-sale inspection and provided a "moisture assessment" property report dated 16 April 2013 for a vendor and charged the vendor \$300 for their services in completing the report ("**the report**"). The report was addressed to the vendors care of their real estate agents, Harcourts Grenadier (Harcourts). Harcourts included the one page report in an auction pack which Harcourts had prepared for the sale of the vendors' property. Attached to the report, the defendants said and as the Judge appeared to accept as fact, was a disclaimer sheet as page 2. Without setting the disclaimer out in full, and as noted above, the disclaimer was to the effect that the report was limited to visual

inspection through non-invasive means.

The plaintiffs were the trustees of a trust called the "Ninfield Trust" and purchased the subject property at auction on 29 August 2013. Prior to the auction, one of the plaintiffs, Ms Steel, obtained a copy of the auction pack and read the report. Ms Steel's evidence was that she relied on this report and after receiving advice from her solicitor, Mr Sweeney, another of the trustees, they were satisfied that weathertightness issues relating to the property were covered, and that there was no indication that the property had moisture damage or related concerns. The plaintiffs accordingly entered into an agreement to purchase the property. Following settlement, the plaintiffs discovered the property had moisture issues, resulting in a loss of value of some \$215,000. The property was later on-sold at a loss, albeit off-set in part by an EQC payment of \$45,000.

### Building inspector personally liable for losses

The Court found both defendants in breach of section 9 of the Fair Trading Act (**FTA**) for misleading statements and omissions contained in the report. Section 9 prohibits conduct "in trade" that is

misleading or deceptive or capable of being so.

Mr Spence argued that only his company was in trade, not him; that he was always acting only as an agent of Spence Consultants and liability could only accrue to the company, a legal entity separate from its directors, shareholders, agents and employees.

As noted above, the Judge did not accept this argument. The Judge referred to several decisions including a decision of the Court of Appeal, *Body Corporate 202254 v Taylor* (NZCA, 2009) as having "dismissed any notion of confining s 9 of the FTA only to corporate liability." In *Taylor*, the Court of Appeal held that representations made in the brochure in question in that case presumably originated from Mr Taylor or were at least approved by him and if they were misleading or deceptive then neither the disclaimer nor the exclusion clause in the brochure were of any help to him. Neither was the corporate form through which Mr Taylor chose to conduct business of assistance to him.

The Judge also contrasted Mr Spence's situation with that the building inspector who avoided personal liability in *North Shore City Council v Wightman* (NZHC,

2010). In *Wightman*, the Court found that although the building inspector was a senior employee, he did not have a sufficient degree of involvement in the governance or management of the company such that he was assuming a personal degree of responsibility.

In the present proceedings, by contrast, Mr Spence:

- Was sole director and 75% shareholder of Spence Consultants,
- Produced most of the reports himself based on his own skill, expertise and experience,
- Conducted the inspection, prepared and signed off the report himself, with no one else involved,
- Was the “alter ego” of the company and was himself in trade within the meaning of the FTA.

On this basis, the Judge held the conduct was “unquestionably” that of Mr Spence and held him liable accordingly.

#### Disclaimer a defence to negligent misstatement -- but not to FTA

The Judge dismissed the disclaimer – that the report was limited to visual inspection through non-invasive means – and found that signs of moisture damage i.e. leaks, mould, water stains and hairline cracks “were readily visible at the time of inspection”; that they were well within the scope of the assessment (headed “Moisture

Assessment”) and should have been disclosed in the report.

The Judge noted that:

- in general, “a disclaimer will be determinative in cases where the cause of action is negligent misstatement”;<sup>1</sup>
- however, disclaimers are less effective against liability under the FTA. Because of its consumer protection nature, suppliers cannot simply contract out of liability under the FTA, as they can in contract.

The Judge contrasted another building inspector case, *Redican Allwood*<sup>2</sup>, where the disclaimer specifically limited the audience of the report to the vendors. Not only that but the defendants in this case had carried out the inspection and report knowing (or if they didn’t know, they ought to have known) that the report was likely to be read by potential purchasers. Given this, the report was capable of misleading the plaintiffs and therefore breached s 9 of the FTA.

#### Quantum

Finally, it is worth noting that the Judge reduced the damages award by 50% to take account firstly of the fact that the plaintiffs, who were “not unsophisticated purchasers”, proceeded with the purchase without a further detailed building report on the dwelling (with invasive moisture testing carried out) being obtained, and secondly, that the defendants received only \$300 for their services and it would

be disproportionate for the defendants to bear the plaintiffs’ full loss.

#### Comment

There are a number of lessons for building inspectors and home buyers:

- For building inspectors, the “invasive reach” of the FTA is a real risk – a risk that is somewhat more acute now that “leaky building claims” against building parties are often time-barred by the 10-year longstop limitation period;
- Disclaimers that are generally effective to defeat claims in negligent misstatement (which can and often do hinge on the element of reliance), are less effective to avoid liability under the FTA;
- To bite in the FTA context, disclaimers will need to be specific. For example, if it is intended that only the vendor in a pre-sale situation be entitled to rely on the report that should be made explicit, as should any limitations as to the scope and content of the report – i.e. if weathertightness is to be excluded then that should be made clear and further specialist reports recommended (as in *Redican Allwood*);
- If you are a director and/or shareholder of a company and carry out the building inspection(s) and reporting yourself, the Court may hold you personally liable under the

<sup>1</sup> *Deeming v EIG-Ansvar Ltd* [2013] NZHC 955 at [63]

<sup>2</sup> *Body Corporate 90315 v Redican Allwood Ltd* [2014] NZHC 1212 (*Redican Allwood*)

FTA for the repair costs or loss in value;

- For home buyers, note should be taken of the 50% reduction in damages because of the Court's perception of "a degree of imprudence", in 2013, given the historical claims associated with monolithic construction techniques, in not getting a further detailed report to explore certain moisture issues that were noted albeit downplayed in the report;
- Home buyers wanting additional protection might also approach the author of the building report seeking clarification of any moisture issues identified, and/or, ask the vendor/s or their agents directly "Is this a leaky home?" (as in *Mason v Magee* [2017] NZHC 51 – as to which see our legal update "Leaky home purchasers succeed in misrepresentation claim against vendors: *Mason v Magee*" dated 8 February 2017).