

Vendors arguably liable for pre-sale report - Court

In the recent High Court decision of *Edwards v Cull* [2014] NZHC 1556, Associate Judge Bell refused to dismiss a misrepresentation claim against vendors based on an allegedly misleading "pre-sale report" they obtained from a third party and provided to purchasers.

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

Background

The Culls bought an Auckland property in July 2008. They experienced no significant problems with the property. In 2010 they decided to move city, so they put the property on the market. On the recommendation of their real estate agent, they engaged Dwell Healthy Homes Ltd ("Dwell Healthy") to inspect the property and prepare a pre-purchase building inspection report dealing with moisture issues. The report was prepared as part of a marketing strategy, with the intention that it could be given to potential purchasers of the property. It appeared to give the property a clean bill of health.

The Edwards viewed the house in February 2011. They received a copy of the Dwell Healthy report. They also obtained their own report from Able Inspections Ltd ("Able Inspections"). This report noted some areas of elevated moisture and recommended further investigations. Upon receiving this report, Dwell Healthy revisited the property and prepared a letter dismissing the concerns raised by Able Inspections and attacking the competence of the report writer. In particular, the letter stated: "If [the inspector] was at all competent he could have easily checked what I have while doing the job he is being paid to do instead of upsetting the parties involved with this sale & purchase."

The Edwards preferred what was said by Dwell Healthy, and purchased the property. Two years later the Edwards discovered significant water ingress problems, requiring repairs costing around \$750,000. They sued various people including the Culls, for misrepresentation. The Culls applied for summary judgment on the basis that the claim could not succeed.

Issue - were the representations made on behalf of the Culls?

In order to establish a claim for misrepresentation under section 6 of the Contractual Remedies Act 1979, a plaintiff has to show: (1) a false statement of past or present fact, (2) the statement was made to the plaintiff, (3) the statement was made by or on behalf of a party to a contract, and (4) the statement induced the plaintiff to enter into that contract.

The primary issue at the summary judgment stage was whether the representations made by Dwell Healthy, in its report and subsequent letter, were made *by or on behalf of the Culls*. That turned on whether Dwell Healthy was the Culls' agent or their contractor.

The difference between an agent and a contractor is often subtle, but it is legally significant, because the employer of an independent contractor is not generally held vicariously liable (legally responsible) for the acts of their contractor.

Decision

The Culls argued successfully that Dwell Healthy was arguably more than an independent expert.

The Judge reasoned that it was arguable that Dwell Healthy had "gone beyond being a disinterested expert invited to supply information, and had become part of the sale force, that is, an agent of the Culls." This conclusion

was based in particular on Dwell Healthy's follow-up letter, which attacked Able Inspections and arguably tried to smooth out matters between the Edwards and the Culls. By that stage, the judge reasoned, Dwell Healthy had become an advocate for the Culls.

On this basis, the Court dismissed the summary judgment application.

Comment

This case is of note because it seems to contemplate the possibility that Dwell Healthy 'became' the Culls' agent by virtue of what it said in its own letter. The Judge came to this conclusion by focussing on the approach Dwell Healthy took to its job, rather than on whether the Culls had consented to Dwell Healthy being able to legally bind them.

That's somewhat surprising, given agency law traditionally looks for some form of express or implied consent to the agency by the principal.

Here, the Culls arguably simply passed on Dwell Healthy's report and letter without endorsing it. They were effectively saying, 'This is what our expert says. We believe him. Take it or leave it.'

We look forward to seeing how the claim proceeds.