IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA669/2018
[2019] NZCA 134

BETWEEN	RIDGWAY EMPIRE LIMITED Appellant
AND	JILL GRANT Respondent

Hearing:	3 April 2019
Court:	Gilbert, Wylie and Thomas JJ
Counsel:	D W Grove for Appellant G P Blanchard QC and E E Hill for Respondent
Judgment:	2 May 2019 at 11 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay the respondent's costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Gilbert J)

[1] This is an appeal from a judgment of Palmer J awarding damages to the respondent purchaser of a residential unit for a precontractual misrepresentation by the appellant vendor about weathertightness.[1]

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[1] *Grant v Ridgway Empire Ltd* [2018] NZHC 2642 [High Court judgment].

[2] Jill Grant purchased a residential unit in Auckland from Ridgway Empire Ltd (Ridgway) in 2009. Ridgway had owned the property since December 2003 and its director, Aaron Ridgway, had lived in the unit until October 2007. At that time, he moved into the adjoining unit 5 which his associated interests had purchased. Unit 4 was leased to tenants before Mr Ridgway decided to sell it. Mr Ridgway marketed unit 4 himself. He showed Ms Grant through the property and spoke to her directly about it. Although there was a dispute in the High Court about the exact wording of Mr Ridgway's oral representation about weathertightness, the Judge considered this was immaterial.[2] This issue is no longer live. It was common ground before us that:

(a) before entering into the sale and purchase agreement, Ms Grant asked Mr Ridgway whether the unit leaked and whether it was a leaky building;

(b) Mr Ridgway replied to the effect "no, the unit does not leak and it is not a leaky building"; and

(c) although Mr Ridgway did not know it at the time, the unit was in fact leaking and it was a leaky building. Because of latent defects, the unit had been leaking for some time causing extensive damage that was not discovered until mid-2011.

[3] The Judge considered Mr Ridgway's statement was an unqualified representation of fact which was false, though innocently made.[3] The Judge found Mr Ridgway's assurance was intended to induce Ms Grant to enter into the agreement to purchase and she reasonably relied on it in doing so.[4] The Judge awarded Ms Grant damages of $474,101, being the repair costs plus $25,000 general damages for stress and anxiety.[5]

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2 At [36].
3 At [38].
4 At [39]–[40].
5 At [61]–[62].

[4] We note in passing that an alternative claim for breach of warranty in relation to works carried out by Ridgway in 2004 failed.[6] There is no challenge to the Judge's findings on this part of the claim. No claim was advanced based on mistake. Any such claim is now time-barred and Mr Blanchard QC, for Ms Grant, confirmed that it is not pursued.

Appeal

[5] Ridgway appeals contending the Judge erred in finding:

(a) there was an actionable misrepresentation of fact;

(b) Ridgway intended to induce Ms Grant to enter into the purchase agreement by making the representation;

(c) it was reasonable for Ms Grant to rely on the representation in entering into the purchase agreement; and

(d) Ms Grant had proved the quantum of the damages awarded.

Misrepresentation

Submissions

[6] Mr Grove submits that Mr Ridgway's statement was a statement of opinion, not an actionable representation of fact. As Ms Grant would have known, Mr Ridgway did not build the unit or have any expertise in the building industry. He was merely expressing his opinion based on his experience of owning and living in the unit. Mr Grove says there was no suggestion that Mr Ridgway knew the unit leaked; Ms Grant did not discover the leaks until mid-2011, nearly two years later. Nor did Mr Ridgway know that it was a leaky building due to design or construction defects. Mr Grove notes that the building was constructed in the early 1970s with the third floor being added around 1983. This was before the relaxation of building controls that led to the leaky building crisis in New Zealand.

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6 At [56].

[7] Mr Grove relies on the majority judgment of this Court in *Magee v Mason* in support of his contention there was no actionable misrepresentation.[7] In *Magee*, the vendor stated in answer to a question whether the property was a leaky home, "absolutely not, we have never had any issues with the property". The purchaser confirmed in her evidence her expectation that if there was anything wrong with the building, the vendor would have noticed it.[8] The majority (Miller and Gendall JJ) considered the vendor's statement that the house was not a leaky building was capable of three meanings: (1) the house had not leaked while the vendors owned it; (2) the vendor knew of no facts establishing that it was prone to leak through design or construction; and (3) it was not prone to leak through design or construction.[9] The majority considered the vendor's statement conveyed meanings (1) and (2) but not (3) because the answer was qualified by the statement "we have never had any issues with it". Miller J reasoned:

> [36] Contrary to the view taken by the Judge, we think the statement that the Magees had never had any issue with the property is not a distinct representation, additional to the statement that it was not a leaky building. It formed part of a single answer to the question whether the house was a leaky building; and it explained and qualified Mrs Magee's negative response. It identified her experience as owner for two years as her reason for stating, almost in the same breath, that the house was not a leaky building. …
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> …
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> [53] … Mrs Mason understood that she was being told the house had not leaked while the Magees owned it.

[8] Mr Grove also relies on Whata J's recent decision in *Shen v Ossyanin*.[10] In that case, the purchaser entered into a conditional agreement subject to receipt of a satisfactory building inspection report to be commissioned by the purchaser from a registered builder or qualified building inspector.[11] After entering into the agreement and following receipt of the building inspection report that identified multiple weathertightness defects,[12] the purchaser met with the vendor in the presence of the building inspector and asked whether the house was leaking or had any problems

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7 *Magee v Mason* [2017] NZCA 502, (2017) 18 NZCPR 902.
8 At [34]–[35].
9 At [29].
10 *Shen v Ossyanin* [2019] NZHC 135.
11 At [4].
12 At [49] and [50].

to which the vendor responded "no".[13] The agreement was then declared unconditional.[14] Whata J found that the vendor's response, in context, meant that the house did not leak while the vendor owned it and the vendor knew of no facts indicating the house would leak because of defects in design or construction.[15] The vendor's statement "could not be elevated to a statement of categorical fact in the face of [the building inspector's] clear expert assessment to the contrary".[16] The Judge also found the purchaser could not reasonably rely on the vendor's statement because the purchaser must have known the vendor was not an expert on weathertightness and did not hold himself out as such.[17]

[9] Mr Blanchard supports the Judge's reasoning. He submits that the statements were unqualified statements of fact, not opinion. Mr Ridgway's response was not expressed as an opinion, for example, he did not say "I don't believe it leaks" or "as far as I know it doesn't leak". Nor did Mr Ridgway qualify his statement with reference to his knowledge or experience. Mr Blanchard submits that this case can be distinguished from *Magee v Mason* and *Shen v Ossyanin* because the unit was not merely leak-prone at the time the statement was made, it was actually leaking. He argues Mr Ridgway's representation that the unit did not leak was a representation of fact that was objectively false at the time it was made. Mr Blanchard relies on O'Regan J's decision in *La Grouw v Cairns* in which the Judge rejected a submission that a representation that there were no leaks was a statement of opinion, not fact:[18]

> [27] Although it was not specifically raised in his points of cross-appeal, Mr Kohler argued that any representation made by Mrs Cairns was a statement of opinion, not a statement of fact, and therefore could not amount to a misrepresentation.
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> …
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> [29] … If Mrs Cairns had stated in response to a question about the present situation, something like "I have experienced leaks in the past, but they are all fixed and as far as I know, there is no current issue with leaks", then Mr Kohler's submission may have had some weight. But what is alleged is that Mrs Cairns simply answered in the negative when asked if the house

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13 At [5], [60] and [63].
14 At [6].
15 At [68].
16 At [70].
17 At [87].
18 *La Grouw v Cairns* (2004) 5 NZCPR 434 (HC).

leaked and the purchaser is entitled to rely on such an answer in the circumstances of this case.

Our assessment

[10] Section 35 of the Contract and Commercial Law Act 2017 relevantly provides:

> **35 Damages for misrepresentation**
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> (1) If a party to a contract (A) has been induced to enter into the contract by a misrepresentation, whether innocent or fraudulent, made to A by or on behalf of another party to that contract (B),—
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> (a) A is entitled to damages from B in the same manner and to the same extent as if the representation were a term of the contract that has been breached;

[11] Whether there has been a misrepresentation of fact is not determined merely by considering the literal meaning of the words used without regard to the context. The enquiry is what a reasonable person would have understood from those words in all the circumstances.[19] Relevant considerations will often include the nature and subject-matter of the transaction, the respective knowledge of the parties, their relative positions and the words used.[20] Where a party with superior knowledge takes it upon itself to make a representation of fact without qualifying it by reference to the basis for its assertion, it will generally have to accept the consequences of being wrong.[21] However, each case will ultimately turn on its own facts.

[12] *Magee* is distinguishable. Unlike Mrs Magee's qualified response and Mrs Mason's understanding of that qualification (that the house had not leaked while the Magees owned it), Mr Ridgway's answer was an unqualified statement that "the unit does not leak" and "it is not a leaky building". The facts in *Shen* are also quite different and the case provides little assistance here. Whata J referred to Palmer J's judgment in the present case and expressed no disagreement with it.[22] The present case is more comparable to *La Grouw*.

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19 *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep 264 at [50].

20 *Bisset v Wilkinson* [1927] AC 177 (PC) at 183.

21 *Re Reese River Silver Mining Company*, *Smith's Case* (1867) LR 2 Ch App 604 at 611.

22 *Shen v Ossyanin*, above n 10 at [84].

[13] The first question that must be determined is whether the statements made by Mr Ridgway that the unit did not leak and it was not a leaky building meant just that (as Palmer J found)[23] or whether they carried an implicit qualification that it did not leak and was not a leaky building to the best of Mr Ridgway's knowledge, based on his experience of having owned and lived in the unit for some years (as Mr Grove contends). The second question is whether the statements, properly interpreted and understood, were false.

[14] Unit 4 was one of five connected townhouses built in the early 1970s. Unit 4 has three levels, with decks on the second and third floors. The third floor was added around 1983.[24] As noted, Ridgway purchased unit 4 in December 2003 and Mr Ridgway lived there from February 2004 to October 2007. Unit 4 was then rented out until Ridgway sold it to Ms Grant. Mr Ridgway's family trust purchased unit 5 in September 2007 and Mr Ridgway lived there from October 2007.[25] Ms Grant knew that Mr Ridgway had significant involvement with the development having at that time owned and lived in two of the five units.

[15] In early 2004, Mr Ridgway carried out alterations to unit 4, including to the kitchen on the second floor. When the gib board was removed from the walls and ceiling of the lounge on this floor, it was discovered that water had been leaking from the third-floor deck. The wood was found to be wet but not rotten. The surface of the third-floor deck was replaced at this time. No building consent was obtained for this work but a safe and sanitary report dated 2 March 2004 was obtained from Independent Property Inspections Ltd.[26] The report identified the relevant building permits issued in 1971 for the original works, and for the extensions (including a sundeck) in 1983. The report relevantly states:

> The deck was originally open slatted, however, a waterproof membrane was subsequently added to the surface to prevent water causing damage to the room below which serves the adjoining unit. The water shed by the membrane is taken to the stormwater system. The deck is displaying some wear but this is well within acceptable parameters.

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23 High Court judgment, above n 1, at [37].
24 At [4].
25 At [5].
26 At [6].

> It is my opinion that the deck covered by [the sundeck permit] is currently both safe and sanitary as defined by section 64 of the Building Act 1991.

[16] Section 64(4) of the Building Act 1991 (since repealed) relevantly provided that a building was deemed to be unsanitary in certain circumstances, including if its provisions against moisture penetration were so insufficient or in such a defective condition as to cause dampness in the building. Mr Ridgway gave a copy of this report to Ms Grant but he did not tell her that prior to this work being carried out water had been leaking from the deck into the walls and ceiling space of the lounge on the second floor. This is also not mentioned in the report.

[17] Significantly, the leaks Ms Grant discovered in mid-2011 were also in the ceiling of the second-floor lounge and had also originated from the deck on the third floor.[27] Moreover, the damage to the timber framing showed clear signs of water ingress over a long period of time, pre-dating Ms Grant's purchase.[28]

[18] We are not persuaded that the Judge was wrong to find that Mr Ridgway's statement was an actionable representation of present fact in all the circumstances. Mr Ridgway marketed and sold the unit himself. He actively promoted it to Ms Grant after he saw her looking at the "for sale" sign erected at the front of the property. His statements "the unit does not leak" and "it is not a leaky building" were expressed as statements of present fact. In their terms, these statements were not qualified in any way or expressed as being merely his opinions. It was not put to Ms Grant in cross-examination that she knew Mr Ridgway was not able to vouch for the correctness of his statements. Mr Ridgway had superior knowledge of the state of the unit having owned it since 2003, carried out significant renovations to it in 2004 and lived in the unit for several years. Mr Ridgway had also owned and lived in unit 5 for two years and he was in the process of carrying out alterations to that unit at the time of his discussions with Ms Grant. Backed by his superior knowledge, Mr Ridgway no doubt felt confident in making the statements he did to support his sales pitch to Ms Grant. He took it upon himself to make these unqualified representations of present fact and must accept the consequences of them being shown to be false.

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27 At [13].
28 At [15], [21] and [38].

[19] Even if the parties should be taken to have understood that Ms Grant was merely enquiring about Mr Ridgway's knowledge of weathertightness issues, the problem for Mr Ridgway is that he did not disclose all material facts known to him. He did not tell Ms Grant that the unit had suffered serious leaks in the past leading to significant water ingress to the timber framing behind the walls and in the ceiling in the second-floor lounge, the very area in which leaks were later found by Ms Grant and which the experts agreed had persisted for an extended period, pre-dating her purchase. On the contrary, Mr Ridgway provided her with the safe and sanitary report, which did not refer to these leaks, to support his unqualified assurance that the unit did not leak and it was not a leaky building. Providing this report without disclosing the leaks that had prompted the need for remediation was misleading. It might have been different if Mr Ridgway had passed on to Ms Grant what he knew about the history of leaks in the unit and stated that as far as he was aware these problems had been fixed. But he did not.

Intention to induce

[20] Although this was raised in the notice appeal, Mr Grove responsibly did not take issue in his submissions with the Judge's finding that Mr Ridgway intended to induce Ms Grant to enter into the agreement by making his statement. The Judge's finding on this issue was plainly correct.

Reasonable reliance

[21] Mr Grove challenges the Judge's finding that it was reasonable for Ms Grant to rely on Mr Ridgway's statement. Mr Grove makes the following points:

(a) Ms Grant ought to have asked further questions such as whether the property had any leaking issues in the past and whether any repair work had been undertaken;

(b) Ms Grant relied on her own thorough inspections of the property which revealed no indication it was leaking;

(c) Ms Grant ought to have obtained an expert opinion before entering into the agreement;

(d) alternatively, Ms Grant ought to have made the agreement conditional on obtaining a property report; and

(e) if Ms Grant was truly relying on Mr Ridgway's statement, this ought to have been included as an express term of the agreement.

[22] We are not persuaded by these points in the particular circumstances of this case. Mr Ridgway's response was clear and unequivocal. There was no need for follow up questions to clarify it. Ms Grant's own inspection of the property was not sufficient to satisfy her that the property did not leak. This explains why she asked Mr Ridgway about it. We consider she was entitled to rely on Mr Ridgway's unqualified assurances given his superior knowledge of the unit. Ms Grant could have commissioned an expert report. However, her failure to do so does not demonstrate that she was not relying on Mr Ridgway's assurance, if anything the opposite is true. The representations could have been included as an express term of the sale and purchase agreement, but this cannot be determinative. Had that course been followed, the claim would be for breach of an express warranty in the agreement, not for misrepresentation inducing the agreement. Weathertightness was a matter of obvious importance to Ms Grant and Mr Ridgway must have appreciated that. The agreement did not purport to exclude reliance on any pre-contractual representations. We see no reason to interfere with Palmer J's conclusion that Ms Grant reasonably relied on Mr Ridgway's representations about weathertightness in entering into the purchase agreement.

[23] We should emphasise the obvious point that each case will turn on its own particular facts. Where it is obvious the vendor is not in a position to know the absolute correctness of a statement made, then, even if the statement is expressed as an unqualified statement of fact, it may be proper to interpret it as no more than a statement of opinion based on facts known or reasonably expected to be known to him or her. Liability in this context should not turn on whether a layperson vendor is sufficiently astute to qualify an oral statement about weathertightness by carefully

limiting it to a statement of their knowledge. The circumstances may make that obvious. Further, it may not be reasonable for the representee to rely on such a statement, expressed orally by a layperson in answer to a question, as an unqualified statement of absolute fact. However, to escape liability in such a case, the representor would need to disclose all material facts known to them bearing on the issue.

Damages

[24] Mr Grove submits Ms Grant failed to prove the damages that were awarded. In support of this submission, he makes two points:

(a) the works involved substantial betterment in that the building frame on the top deck was extended and fully enclosed; and

(b) Ms Grant failed to provide full specifications of the work that had been completed and comprehensive costings for the work yet to be done with the result that Ridgway's expert could not respond.

[25] Palmer J accepted the invoices produced for work completed and the estimate for the proposed work evidenced the cost of repairing the damage.[29] The reasonableness of these costs, which were adjusted to allow for betterment, was supported by independent expert evidence. The onus then shifted to Ridgway to prove the existence of other items of betterment not accounted for and the value of these.[30] Ridgway did not offer any expert evidence contradicting the quantum claimed by Ms Grant. Nor did it adduce any evidence identifying and quantifying any betterment not accounted for in the claim. We are unable to see any flaw in Palmer J's analysis and conclusion on the quantum of damages. The Judge's findings were well-justified on the evidence.

Result

[26] The appeal is dismissed.

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29 At [60].
30 *J & B Caldwell Ltd v Logan House Retirement Home Ltd* [1999] 2 NZLR 99 (HC) at 110.

[27] The appellant is to pay the respondent's costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Quay Law, Auckland for Appellant
Blackwells, Auckland for Respondent