



And the nominees are...

A recent High Court case, *Forbes v Townsend* [2023] NZHC 2578, has shed some light on an often-overlooked matter in the sale and purchase of real estate – that of nominees.

The case illustrates the potential repercussions of nominating third parties as the purchasers in a property transaction. Notably, the purchasers found themselves unable to claim they were misled into entering the agreement, given that they had not personally signed the document but rather acted as nominees.

The case also delves into the requirement that a party alleging that they were induced to enter into a contract based on a representation, must demonstrate reasonable reliance on that representation.

Background

This case related to a property in the Auckland suburb of Remuera.

The property was owned by the trustees of a trust, who had owned it since November 2010 (**Vendors**). Towards the end of 2019 the property was marketed for sale. The auction took place on 8 November 2019. Settlement took place on 24 January 2020.

One of the Vendors, Ms Townsend, resided at the property between November 2010 and 24 January 2020. Ms Townsend acknowledged to the Court that there had been leaks and other watertightness issues with the property, but that she had also undertaken repairs including steps to ensure the property was fit for sale.

The plaintiffs in this case were the purchasers of the property (**Purchasers**). Two of the plaintiffs/Purchasers, Mr and Mrs Forbes, inspected the property in late 2019. They also engaged Whats Up House Inspections Ltd to provide a builder's report prior to the auction which, as matters would have it, identified damp moisture readings and that there was a high risk that weathertightness issues could arise.

On the morning of auction, Mrs Forbes sent an email to the Vendors' real estate agent, which stated:

Please confirm by return email that there haven't been any leaks or water tightness issues that we should be aware of?

The real estate agent responded within an hour and stated:

Sarah [Townsend] confirms no leaks to her knowledge.

Mr Forbes (but not Mrs Forbes) attended the auction and was the successful bidder. On the auction agreement, Mr Forbes was recorded as the purchaser "...and/or nominee".

Prior to settlement, Mr and Mrs Forbes and Mr Gallagher, as trustees of a trust, were nominated as the Purchasers of the property.

In late 2021, the Purchasers discovered water ingress at the property and engaged a weathertight home specialist to inspect the property. A range of weathertightness defects were discovered.

The Purchasers brought a claim, and sought summary judgment, against the Vendors on the basis that they had been induced to purchase the property by way of a misrepresentation.¹

The issues

The issues addressed by the Court included:²

1. Whether the Purchasers, as nominees, could bring a claim for an alleged pre-contractual misrepresentation?
2. Whether the representation was false?
3. Whether Mr Forbes (being the Purchaser that attended the auction and entered into the agreement for sale and purchase) was induced to enter into the agreement by the representation and, if he was, whether his reliance on it was reasonable?

Decision

Could the Purchasers, as nominees, bring the claim for an alleged pre-contractual misrepresentation?

The Court held that the Purchasers could not bring the pleaded claim.

The Court held that nominees generally have no right to damages for pre-contractual misrepresentations not made to them. The reason for this is that a nominee does not have a cause of action against another contracting party based on an inducing misrepresentation because such a misrepresentation is not a “promise” contained in a contract (or deed). The named purchaser is, and remains, the only party to the contract. The additional words “or nominee” are, in effect, a statement of a right which the purchaser has to nominate the persons who are to take legal title.

On this basis, the Judge considered that the Vendors did have an arguable defence to the claim and that the summary judgment application must be declined.

Was the representation false?

Ms Townsend (one of the Vendors) had confirmed prior to the auction that there were “*no leaks to her knowledge.*”

The Court concluded that Ms Townsend’s statement (passed on by the real estate agent), without further elaboration about her knowledge of past defects, was false and a misrepresentation.

¹ The Purchasers’ claim was pursuant to section 35 of the Contract and Commercial Law Act 2017 which enables damages for misrepresentations, whether innocently or fraudulently made, inducing a party to enter into a contract.

² We note that there was a fourth issue (namely, whether summary judgment was appropriate in any event) which we do not address in any detail in this summary.

Was Mr Forbes induced to enter into the agreement to purchase by the representation?

The Court was not satisfied that Mr Forbes was induced to enter into the agreement on the basis of the representation. The Court held that whilst Mr Forbes may have relied upon the representation, this reliance was not reasonable in light of the building report obtained by Mr and Mrs Forbes prior to the auction (which noted that there were damp moisture readings and there was a high risk for weathertightness issues to arise).

Conclusion

Although this decision pertained to a summary judgment application, the issues of identifying the correct parties and determining who should have brought the claim (or, indeed, how the claim should be pleaded) are important considerations for anyone involved in either bringing or defending a claim.

And, the nominees were ... unsuccessful. Time will tell if the matter proceeds to trial.

Our thanks to Dominic Clapham (Senior Solicitor) and John Morrison (Partner) for writing this article

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