

CONSTRUCTION PRELIMINARY AND GENERAL >>UPDATE

In this issue:

Supreme Court decision on breach of a vendor's warranty
[Read more](#)

A small loophole in the 'long stop' provision in the Building Act?
[Read more](#)

Auckland 'Super City'—turbulent times ahead for suppliers
[Read more](#)

The rectification of defects
[Read more](#)

SUBSCRIBE HERE >>
Sign up and stay informed

Supreme Court decision on breach of a vendor's warranty

In an REINZ/ADLS Agreement for Sale and Purchase of Real Estate, a vendor provides a number of warranties in respect of the property. If the vendor breaches one of these warranties, what can the purchaser do before settlement? Can the vendor still require the purchaser to settle in full notwithstanding the breach?

The warranties

It is often overlooked that the standard REINZ/ADLS Agreement for Sale and Purchase of Real Estate contains warranties relating to building work. If a vendor has 'done or caused or permitted to be done work requiring a building consent', then the vendor warrants that the consent was obtained, that the work was completed in accordance with the consent, and that a code compliance certificate was issued. In other words, the vendor warrants that the Building Act and the Building Code have been complied with.

If a purchaser enters into an agreement but, prior to settlement, discovers that one of these warranties has been breached, the purchaser may be reluctant to settle until the breaches are remedied. Depending on the extent of the work required, settlement may be deferred for an extended period of time.

Such a situation occurred in the recent Supreme Court case of *Property Ventures Investments Ltd v Regalwood Holdings Ltd*.

The facts of the case

In 2004, Regalwood agreed to sell a commercial property to Property Ventures. The agreement used was the standard REINZ/ADLS, 7th edition. The agreement contained, in clause 6, the vendor warranties mentioned above. (These warranties are also in the current 8th edition.)

On the due settlement date, Property Ventures discovered that the building had no warrant of fitness and did not comply with Council requirements. Property Ventures refused to settle until a warrant of fitness was obtained. Over the next 18 months, the parties tried unsuccessfully to resolve the matter, and finally Regalwood issued a settlement notice on Property Ventures requiring settlement in full within 12 working days.

Property Ventures made it clear that the breach of the vendor's warranties substantially reduced the value of the property. It claimed a discount from the settlement price of \$500,000.

Regalwood refused to reduce the purchase price. It eventually cancelled the contract and obtained summary judgment for forfeiture of the deposit. In court, Regalwood relied on clause 6.5 which provided:

Breach of any warranty or undertaking contained in this clause does not defer the obligation to settle. Settlement shall be without prejudice to any rights or remedies available to the parties at law or in equity, including but not limited to the right to cancel this agreement under the Contractual Remedies Act 1979.

The Court's ruling

The Supreme Court held that a breach of a vendor's warranty is not a licence for a purchaser simply to sit on its hands, refusing to settle until the breach is remedied. In other words, the purchaser only has two options. It can either:

Stuart Robertson
PARTNER | AUCKLAND

DDI 09 375 1151

stuart.robertson@kensingtonswan.com

Mary Haggie
PARTNER | WELLINGTON

DDI 04 915 0780

mary.haggie@kensingtonswan.com

- proceed to settlement but expressly claim compensation for a reasonable amount to be deducted from the purchase price; or
- cancel the contract if there was a material breach resulting in the property being completely different from the purchaser's understanding at the time the agreement was entered into.

If the purchaser seeks to defer settlement because the warranties are unfulfilled, the vendor may sue for specific performance and obtain settlement.

However, the Court held that clause 6.5 did not state that the obligation to settle had to be **in full**. Property Venture's borrowing capacity and/or insurance was prejudiced by Regalwood's breach. Therefore, Property Ventures was entitled to a reasonable set-off against the purchase price. If Regalwood did not agree with the amount of the set-off, it should have sued Property Ventures for specific performance and asked the Court to resolve the question of the disputed amount of the deduction.

Instead, Regalwood's insistence on the full purchase price meant that it was not ready, able, and willing to settle. This was an essential pre-condition to issuing the settlement notice, and so Regalwood's cancellation was held to be invalid on that basis.

What does this mean for you?

This decision should increase awareness of the parties' rights and obligations in breach of warranty situations. Purchasers can be reassured that they have a right to a reasonable set-off from the purchase price.

Vendors can be reassured that settlement may not legitimately be stalled by the purchaser. Yet both parties also have a duty to address, realistically, the property's loss of value

stemming from the breach of warranty. In these circumstances, vendors and purchasers may in future be more willing to engage in meaningful negotiations as to a sensible reduction in the price.

This article was written by Anita Lee, a solicitor in our Construction team in Auckland.

Start a conversation with us...

Your team of specialists at Kensington Swan are on top of the issues and can provide you with practical advice on operating in today's dynamic business environment.

If you would like further information about these articles or any other construction law issue, contact any of Kensington Swan's specialist Construction team

Auckland

Chris Booth

Partner

Phone: +64 9 375 1143

chris.booth@kensingtonswan.com

Paul Buetow

Partner

Phone: +64 9 375 1114

paul.buetow@kensingtonswan.com

Stuart Robertson

Partner

Phone: +64 9 375 1151

stuart.robertson@kensingtonswan.com

Duncan Halliwell

Senior Associate

Phone: +64 9 915 3364

duncan.halliwell@kensingtonswan.com

Kelly Wilshire

Senior Associate

Phone: +64 9 375 1116

kelly.wilshire@kensingtonswan.com

Wellington

Andrew Skelton

Partner

Phone: +64 4 498 0857

andrew.skelton@kensingtonswan.com

Mary Haggie

Partner

Phone: +64 4 915 0780

mary.haggie@kensingtonswan.com

Sherwyn Williams

Consultant

Phone: +64 4 498 0882

sherwyn.williams@kensingtonswan.com

Abu Dhabi

Richard Cathie

Consultant

Phone: 971 55 482 7418

richard.cathie@kensingtonswan.com