**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV-2015-404-000294**
**[2015] NZHC 3009**

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| BETWEEN | OLEG LYKOV AND NATALIA LYKOVA<br>Appellants |
| AND | JEI WEI AND BAOYI MA<br>Respondents |

Hearing: 22 July 2015

Appearances: A M Swan for Appellants
E St John for Respondents

Judgment: 30 November 2015

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**JUDGMENT OF HINTON J**

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*This judgment is delivered by me on 30 November 2015 at 5.45 pm pursuant to r 11.5 of the High Court Rules.*

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*Registrar / Deputy Registrar*

Solicitors/Counsel:
Whitlock & Co, Auckland
E St John, Auckland

## Introduction

[1] This is an appeal against a judgment of Judge Harrison in the District Court where he granted judgment to the respondents ("the Weis") for breach of warranty under a sale and purchase agreement and, alternatively, on the basis of unjust enrichment.

[2] The proceeding relates to a sale on 5 March 2006 by the Lykovs to the Weis of apartment 52, 92 Bush Road, Albany ("the apartment"). The apartment formed part of a development known as "The Grange", a residential complex consisting of 105 residential apartments within 18 two level buildings. The apartment is a first floor two bedroom apartment.

## Background

[3] The vendor Lykovs had purchased the apartment on 8 March 2005 for $236,000, only one year before selling to the Weis. After the Lykovs bought the apartment, the complex was discovered to have leaky building syndrome.

[4] On 8 August 2005, the body corporate held its annual general meeting, at which time the then owners were notified of the building defects within the complex and the estimated costs to repair of approximately $6m. The owners were also notified that special levies needed to be raised to fund the legal costs and the repairs. To this end, it was resolved that the body corporate and the owners would issue proceedings against the various parties who played a part in the development and that the body corporate would be authorised to levy a total sum of $130,000 from the owners to fund commencement of the legal proceedings.

[5] In late 2005, the Lykovs paid approximately $2,500 as their share of the special levy in accordance with the August 2005 resolution.

[6] The Lykovs had borrowed the full purchase price for the apartment and their financial position was such that they were unable to meet the future remedial costs,

so they decided to put the property on the market. In December 2005 they engaged Ray White, Albany as their agents to sell the property.

[7] On 1 March 2006, the body corporate and all the then owners (including the Lykovs) issued proceedings in the High Court at Auckland against the Council and others ("the body corporate proceedings").

[8] On 5 March 2006, after some negotiations, the Weis and the Lykovs entered into an agreement for sale and purchase where the Weis agreed to purchase the apartment for $250,000 ("the agreement"). Prior to signing, the Lykovs did not make any disclosure of the leaky building issues.

[9] The agreement contained a warranty in clause 7.1(6) that the vendor has no knowledge or notice of any fact which might give rise to or indicate the possibility of the vendor or the purchaser incurring any liability under ss 14, 33 or 34 of the Unit Titles Act 1972; or any proceedings being instituted by or against the body corporate. Section 33 empowered a body corporate to recover money expended for repairs.

[10] The agreement was conditional on a suitable builder's report and finance within five working days of the date of the agreement.

[11] On 7 March 2006, the Lykovs' solicitors provided the Weis' solicitors with a copy of the body corporate minutes from the meeting of 8 August 2005. The covering letter simply referred to enclosure of the minutes. The body corporate minutes recorded inter alia that proceedings were being issued arising out of leaky building syndrome, every owner needed to be levied and that the proceeds of "any payout" will be applied to repairs. The minutes refer to the levy of $130,000 that preceded the Weis' purchase.

[12] The Weis' solicitor told the Weis there were leaky building issues, without forwarding the body corporate minutes at that stage.

[13] On 8 March 2006, Mr Wei revisited the property with Mr Fan, one of the Ray White agents acting for the Lykovs on the sale. At that time, Mr Fan told Mr Wei

that the Lykovs' apartment did not have any weather-tight issues and therefore he should not waste money on obtaining a builder's report. The inspection revealed that the carpet had a slight fold and needed straightening and that there was a slight leak from the left hand corner of the shower box. Still on 8 March 2006, Mr Fan sent a fax to the Weis' lawyer confirming the existence of these two faults. That fax included a Moisture Ingress Report dated 13 October 2005 relating to apartment No 54 (next door to No 52).

[14] The Weis did not obtain a builder's report.

[15] On 10 March 2006, the Weis declared the agreement unconditional.

[16] On 13 March 2006, the body corporate issued a s 36 Certificate under the Unit Titles Act 1972. It recorded inter alia that the body corporate had engaged Cove Kinloch to design a remediation solution for the total complex and that it was contemplated this will be followed by repair work which will involve all owners in liabilities under ss 33 and 34 of the Act.

[17] On 15 March 2006, the Weis' solicitors forwarded the August 2005 body corporate minutes to the Weis.

[18] On 20 March 2006 settlement of the purchase was completed.

[19] Nineteen months later, on 17 October 2007, the body corporate levied the Weis $99,751 for remedial works. On 27 June 2008, the Weis paid the first $60,000 towards those remedial costs and on 3 July 2008, they paid the balance of $39,751. The Weis were levied a final sum of $18,615 on 11 September 2009. They also paid penalty interest of $5,452 because they had not budgeted for these costs and had difficulty raising the money.

[20] In September 2010 the body corporate proceeding was settled. The Lykovs, who had remained one of the plaintiffs in that proceeding, received $91,562 from the settlement proceeds. As recorded earlier, the Lykovs had been levied and had paid approximately $2,500 towards legal costs in late 2005, while they were owners. The

sum of $11,825.84, being the balance of the legal costs, was deducted from the settlement proceeds before the Lykovs received the sum of $91,562.

[21] The Weis, who had paid the remedial costs, while the payout from the body corporate proceeding had gone to the Lykovs, sued the Lykovs for breach of warranty under the sale and purchase agreement.

**District Court hearing and decision**

[22] In the District Court, in closing submissions, the Lykovs conceded they were in breach of clause 7.1(6) of the agreement as they knew the vendor or purchaser might incur a liability under s 33 of the Unit Titles Act, which empowered a body corporate to recover money expended for repairs. However, the Lykovs argued, as they do on appeal, that the Weis had either affirmed the contract or waived the warranties, and that the effect of either was that the Weis had lost any rights they may have for breach.

[23] The District Court Judge found as a fact he was "quite satisfied" that the Lykovs did not become aware of the breach of warranty until after settlement and therefore there was no affirmation of the contract. The District Court Judge held that neither the minutes, nor the s 36 certificate, made it clear that the Weis as a purchaser would be levied for the costs of repair.

[24] For similar reasons, the Judge held that there was no waiver of the warranties. He said that not seeking a building report, which the Weis as purchasers were entitled to require, did not amount to a waiver of rights arising for breach of warranty.

[25] He therefore found there was an actionable breach of warranty.

[26] The Judge considered there was an alternative basis of unjust enrichment upon which the Weis were entitled to recover. He said that the Lykovs should have assigned to the Weis their interest as plaintiffs in the proceedings. The body corporate's solicitors made a mistake in informing the Lykovs that they should

remain a party to the proceeding on the basis that the new purchasers could not make a claim, as they had bought the apartment with full knowledge of the weathertightness issue and had bought at an undervalue. The Judge said that this conclusion was a mistake of fact as the Weis did not have full knowledge and did not buy at an undervalue. Had this mistake not been made, the Judge said that the Weis would have taken an assignment of the appellant's rights.

[27] The Judge concluded that this mistake caused the payment to the Lykovs, to which they were not entitled as they made no payment towards remedial costs. He said that their part contribution to legal costs of the proceeding did not entitle the Lykovs to the payment.

**Appellant's submissions**

[28] Mr Swan argued, as in the District Court, that the Weis affirmed the contract and/or waived the breach and further, there was no unjust enrichment. He says a fair reading of the body corporate minutes makes it clear that substantial repair costs would be levied from the owners and the s 36 certificate confirmed that. That had to mean there was actual knowledge and the Weis waived the warranty by declaring the agreement unconditional.

**Discussion**

[29] The starting point, as the District Court Judge found, is a conceded breach of warranty by the Lykovs. The breach had to be conceded on the evidence. At the start of the District Court hearing, the Lykovs' position had been that they told the Weis of the leaky building issues before the agreement. By the end, including on their own evidence, it was clear this was not true.

[30] In my view the argument raised as to affirmation of contract is a red herring. Affirmation only stops an innocent party from cancelling a contract; it does not stop them from suing for damages, which is the claim made by the Weis in this case.

[31] The primary issue is: did the Weis waive the breach of warranty?

[32] A waiver requires a clear, unequivocal representation. This may be made by conduct as well as words.[1] The intention to waive must be made manifest to the other party, either expressly or by conduct.[2] The authors of *Law of Contract in New Zealand* note that a person relying on waiver must show that he or she has relied on the representation made.[3]

[33] For good reason, a waiver of a warranty does not arise too readily. The purpose of a purchaser seeking and a vendor providing a warranty, is to give an assurance or undertaking which forms part of the contract and influences price and the other terms of agreement.

[34] Knowledge of a breach of warranty, acquired after signing an agreement, whether acquired before an unconditional date, before settlement or after settlement, would obviously not generally amount to waiver. If that were so, warranties could be given that influence the price, followed by full disclosure before settlement, leaving the purchaser without a remedy.

[35] In this case, there was no clear unequivocal representation by the Weis that they would waive the warranty.

[36] However, there have been a number of cases on which Mr Swan relies, particularly arising out of leaky home litigation, which involve what is referred to as an "implied waiver of warranty".[4] These are cases where there is an overlap between a warranty and a condition in a sale and purchase agreement. It has been suggested in several such cases that where a purchaser has actual knowledge of a breach of warranty because of the exercise of the purchaser's rights under a condition precedent which overlaps with the warranty, and the purchaser goes unconditional after acquiring that knowledge, then the right to sue for breach of warranty is lost. In some cases it has been suggested that a purchaser might even

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1 *Neylon v Dickens* [1978] 2 NZLR 35 (PC); *Connor v Pukerau Store Ltd* [1981] 1 NZLR 384 (CA).

2 *Sorenson v Easter* (1994) 2 NZ ConvC 191,855 (HC).

3 John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [19.3.2].

4 *Brebner v Collie* (2013) NZWHT 23; *Spicers Paper (NZ) Ltd v Whitcoulls Group Ltd* HC Auckland CP181/94, 8 September 1994; *Singh v Rutherford* [2012] NZHC 380, [2012] NZAR 323; and *Shek v Goodwin* HC Auckland AP 101/SW00, 1 November 2000.

impliedly waive a warranty in the absence of actual knowledge but on the basis of knowledge they would have acquired if proper inquiries had been made pursuant to a condition, such as the builder's report condition in this case.

[37] *Shek v Goodwin* is claimed to be in the latter category. Paterson J found that notice that a structural report condition was waived, constituted a waiver of the parts of any warranty that overlapped with the matters that would have been covered by such a report. That decision has to be read in context, including the fact it was a summary judgment application.

[38] I agree with Dr D McMorland that whatever the extent of the law as to "implied waiver" of the warranty might be, it should be no wider than necessary.

[39] I agree entirely with the views expressed by Wylie J in *Singh v Rutherford*[5] and the conclusion of Dr McMorland's article:[6]

> … There has also been discussion of the possibility that a purchaser might lose the benefit of the warranty on the basis of facts of which the purchaser would have acquired knowledge had full and proper inquiries been carried out pursuant to the condition inquiries which were not carried out. Such a possibility would significantly widen the scope of an implied waiver of the warranty. The possibility was recognised without comment by Master Kennedy Grant in *Spicers Paper*, but in *Singh* (at [38]), Wylie J expressly disagreed with it and went on to discuss the issue at greater length. Wylie J referred to the earlier judgment of Patterson J in *Foote Bros v Kevith Holdings* at [18-19] as authority in support. The reasoning in *Singh* was applied in *Kaitai Timber v Alternative Enterprises*. With respect, this too appears to be correct. The implied waiver should not be wider than necessary and should not be extended on the basis of what might have been found out had more thorough inquiries been made. The purchaser should be entitled to rely upon the warranty, except in respect of actual knowledge received in pursuit of inquiries made under the condition.

[40] At a minimum, in my view, the vendor would need to establish actual knowledge by the purchaser prior to the unconditional date, that the warranty had been breached, for there to be an implied waiver of that warranty.

[41] In this case, the District Court Judge found that the purchaser did not, at the date the agreement was made unconditional, or for that matter at settlement, have

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5 *Singh v Rutherford,* above n 4, at [37]-[43].

6 Don McMorland "Conditions v Warranties" (2013) 15(16) LexisNexis Conveyancing Bulletin at 211 at 213.

actual knowledge of facts which might give rise to liability for substantial levies for watertight repairs under s 33 of the Unit Titles Act, i.e. they did not have actual knowledge of the vendor's breach of cl 7.1(6).

[42] Mr St John correctly pointed out that a factual finding is more difficult to overturn on appeal where it involves an assessment of credibility. He says the Judge's finding did turn, in part, on credibility and he pointed out that the Judge expressed his finding in strong language.

[43] I agree that in this case the Judge heard evidence from the parties and he believed Mr Wei as to the state of his knowledge. That finding involved an assessment of Mr Wei's credibility.

[44] The Judge also considered the surrounding facts and documents in reaching his factual finding.

[45] Mr Swan argues that the Weis' post-agreement knowledge came from receipt of the body corporate minutes and the s 36 notice. While these documents might have informed the Weis that proceedings had in fact been issued by the body corporate and a number of details around those proceedings, they did not inform them on an overall reading that they, as purchasers, could be liable for levies for the cost of repairs. The s 36 certificate has to be read in the context of the minutes which talked of a number of points around this, the end result of which could well be confusing to someone who has the benefit of a covenant that the vendor is not aware of any liability for repairs for this apartment and who has been told expressly that the apartment has no weathertight issues. Further, I do not consider the Weis had an obligation to inform themselves from the documents. Even if the documents could or should have so informed the Weis, the Judge found as a fact on an assessment of Mr Wei's credibility, that the Weis were unaware that they would be levied for remediation costs. I can seen no basis for overturning that finding, which disposes of any argument as to implied waiver of warranty for the reasons set out by Dr McMorland and with which I concur.

[46] In fact, in my view the Judge's finding seems to be entirely consistent with the broader facts. The Weis had the benefit of covenants from the vendor. They had also been explicitly told by the Lykovs' agent that their apartment did not have any weather-tight issues. They were entitled to rely on the covenants and express representations. It was most unlikely in these circumstances they would be trawling through documents, especially when the point even then was not explicitly made, for example in a cover letter. Further, in my view, if the Weis had known there was a possible liability on their part for weather-tight issues, they would not have simply let the conditional date pass without comment or not bothered with the builder's report. That would have made no sense.

[47] There was clearly no unequivocal representation by the Weis that they waived the warranty, nor any basis for implying such a waiver, to the extent such a concept does have legal recognition.

[48] I therefore concur with the Judge's finding that there was no waiver of the warranties and that damages followed for breach.

[49] If I am wrong in the view expressed earlier, that affirmation is not applicable here, I find there was no affirmation of the contract by the Weis for the same reason that there was no waiver. The Weis had no knowledge upon which to affirm.

**Unjust enrichment**

[50] I go on to consider the alternative ground of unjust enrichment on which the Judge found for the Weis.

[51] Again I agree with the Judge, although I consider the answer can be reached by a shorter route.

[52] The District Court Judge referred to *Law of Contract in New Zealand*:[7]

> For a long time the law has had a series of rules enabling one person to recover money from another where the retention of money or some other

[7] John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [2.3.4].

> benefit would unjustly enrich that other party at the expense of the first. For example, recovery will be ordered where the plaintiff has been compelled to pay money for which the defendant is liable; where money has been paid under a mistake … or where the plaintiff has conferred a benefit on the defendant in circumstances where it is fair that it should be paid for.

[53] The leading authority in this area is now the Court of Appeal and Supreme Court decisions in *Stiassny v Commisioner of Inland Revenue*.[8] The Court of Appeal cited with approval the latest edition of Goff & Jones:[9]

> The courts have held that a claimant must demonstrate three things in order to make out a cause of action in unjust enrichment: that the defendant has been enriched, that this enrichment was gained at the claimant's expense, and that the defendant's enrichment at the claimant's expense was unjust. If these three requirements are all satisfied, then the further question arises, whether there are any defences to the claim, and if there are not, then the court must decide what remedy should be awarded.

[54] The claim being brought in the body corporate proceedings was a claim to recover remedial costs incurred. Any monies recovered under that proceeding could only be claimed by and paid to those who had incurred the remedial costs. That was the Weis and not the Lykovs. The Weis therefore had to be treated as being in the shoes of the Lykovs, though the Lykovs were the named plaintiffs. There was simply nothing recoverable by the Lykovs in that proceeding.

[55] There is no doubt that the Lykovs have been enriched by the payout; that enrichment was gained at the Weis' expense and it was unjust. There is no defence to that.

[56] Alternatively, applying the language of *Law of Contract in New Zealand,* the body corporate solicitors, or whoever made the payment to the Lykovs, clearly did so under a mistake, or was in error, with the result that the Lykovs were unjustly enriched at the expense of the Weis.

[57] The Lykovs say: but we have lost value here and that was what we received the money for. That is simply wrong. It is rewriting the facts. That was not the

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8 *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106, [2013] 1 NZLR 453; *Commissioner of Inland Revenue v Stiassny* [2012] NZCA 93, [2013] 1 NZLR 140.

9 At [92], citing Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff & Jones The Law of Unjust Enrichment* (8th ed, Sweet &Maxwell, London, 2011) at [1.09].

body corporate proceeding as pleaded, or the basis on which it was settled. If the Lykovs had wanted to bring such a claim against the Council and others, they could presumably have done so, but did not. Further, I do not consider they would have succeeded. It seems the price they achieved in selling to the Weis was achieved without any knowledge on the Weis' part of leaky building issues. How can it then be said the Lykovs lost out because of those issues? Further, I note that though they on-sold within only a year, the Lykovs managed to achieve a six per cent price uplift, which commonsense would dictate would not be achievable with a leaky home stigma.

[58] I consider it irrelevant that the Weis sold the apartment in February this year (nine years after the event) for $420,000. I allowed the Lykovs to adduce further evidence in this regard but it does not alter the position.

[59] If I am wrong in my abbreviated approach to the unjust enrichment claim, then I agree in any event with the Judge's reasoning and conclusion on this ground.

**Result**

[60] The appeal is dismissed.

**Costs**

[61] Costs are awarded to the respondents on a 2B basis.

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Hinton J