

Vendors not liable to purchasers of earthquake prone building said to be 60% NBS

Vendors of a commercial building who said it had a "good NBS rating" of 60%, in reliance on an Initial Seismic Assessment supplied to the purchaser, have been found not liable for misrepresentation, despite two later Detailed Seismic Assessments concluding the building was earthquake prone, in the Court of Appeal's decision of *Weine & Ors v Tadd Management Ltd.*¹

Facts

The Trustees of the Ruth Weine Family Trust (**Vendors**) were advised by their real estate agent, Bayleys, to obtain information about the seismic capacity of the commercial building for prospective purchasers.

The Trustees obtained an Initial Seismic Assessment (**ISA**) from a firm of chartered engineers which concluded the building was 60% New Building Standard (**NBS**).

NBS rating

Seismic assessments provide a building with an NBS percentage which is the expected seismic performance of a building relative to the minimum human life safety standard required by the Building Code for a similar new building on the same site.

The Seismic Assessment of Existing Buildings: Technical Guidelines for Engineering Assessments (the **Guidelines**)² state that a building rated below 67%, the threshold for acceptable seismic risk, is an "earthquake-risk building" and those under 34% are considered "earthquake prone".

ISA vs DSA

An ISA is prepared following an Initial Evaluation Procedure (**IEP**). The IEP methodology is said to be a "qualitative procedure" that is expected to:³

identify, to an acceptable level of confidence and with as few resources as possible, most of those buildings that fall below the earthquake-prone building threshold without catching an unacceptable number of buildings that will be found to pass the test after a DSA.

A Detailed Seismic Assessment (**DSA**) is a quantitative procedure which is more extensive and is appropriate where a higher level of reliability than an ISA is required.

The ISA obtained by the Vendors

The ISA obtained identified elements that could be investigated further via a DSA. A covering letter noted that an ISA is a "relatively coarse process" and it is not as "sophisticated or accurate" as a DSA, although it suggested ISAs are usually conservative so the building's NBS might increase with a DSA.

The ISA contained a disclaimer on each page which included the note that:

WARNING!! ... Detailed inspections and engineering calculations, or engineering judgements based on them, have not been

¹ [2024] NZCA 323.

² Ministry of Business, Innovation and Employment, jointly with the Earthquake Commission, the New Zealand Society for Earthquake Engineering, the Structural Engineering Society and the New Zealand

Geotechnical Society, *The Seismic Assessment of Existing Buildings: Technical Guidelines for Engineering Assessments* (July 2017) (**Guidelines**).

³ Guidelines, above n1, at B3.1.

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undertaken, and these may lead to a different result or seismic grade.

The marketing information package

The ISA and its covering letter were included in an information package provided to prospective purchasers, along with an information memorandum prepared by Bayleys. The information memorandum stated under "*investment highlights*" that the building had a "*good NBS rating*".

The DSAs obtained by the purchaser after sale

After purchasing the property, Tadd Management Limited (**Tadd/purchaser**) obtained two DSAs which identified that the building was 10% and 30% NBS. The cost of the seismic strengthening that was required to be undertaken was much higher than anticipated.

The proceedings

Tadd sued the Vendors for misrepresentation of the seismic capacity of the building and, in the alternative, that both parties were induced to enter into the Agreement for Sale and Purchase by the common mistake that the building was 60% NBS.

The Vendors joined the engineers who produced the ISA as a third party, alleging negligence, breach of contract and breach of the Fair Trading Act 1986.

High Court finds Vendors liable

Engineers not liable as basis of ISA reasonable

The High Court Judge found on the basis of the DSAs that the building's NBS rating was not 60% and that it was earthquake prone. However, the High Court found that there was a reasonable basis for the engineer's conclusions in the ISA. The ISA was prepared correctly with the skill, care and diligence normally expected of a competent professional. The engineer's opinion on the NBS was reasonably held and reasonably based, on the basis of the IEP methodology.

Misrepresentation

However, the High Court found that the ISA contained statements of fact and opinion and amounted to a representation, despite the disclaimer. The Judge also held that the information memorandum which said that the building had a "*good NBS rating*" was an unqualified statement of fact which stood apart from the ISA. The Vendors were therefore liable in misrepresentation to Tadd for representing that the building's NBS was 60%.

Mistake

The Judge also found that both parties operated under the common mistake that the building's NBS was 60% and that this induced Tadd to enter the contract.

Court of Appeal overturns High Court

The Court of Appeal agreed the ISA of 60% NBS was an expert opinion which contained statements of fact. However, the ISA was not a statement of fact that the building was 60% NBS in absolute terms, or that the NBS rating had been confirmed to the level of a DSA.

In context, the relevant statements of fact conveyed in the ISA were that the engineer had calculated the building's assessed rating at 60% NBS applying the IEP methodology, acting honestly and reasonably. Those facts were true.

The Court of Appeal agreed that the "*investment highlight*" of a "*good NBS rating*" was a statement of fact, but it was not an unqualified statement that stood independently of the ISA. It had to be considered in context and, "*standing back*", the statement that the NBS rating was "*good*" was clearly an opinion about the

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rating given in the ISA. The Court found:⁴

It was not a representation that the building was 60% NBS applying the different evaluation procedure applicable for a DSA.

The Court of Appeal also commented that for 60% NBS in the information memorandum to mean anything to prospective purchasers, they would have had to have understood the concept of the NBS rating under the Guidelines and they had to have known that the representor (Bayleys or the Vendors) "was not in a position to the know the truth of a "60% NBS" statement as a statement of fact".⁵

The claim of misrepresentation therefore failed, as did the claim of contractual mistake. The parties were both operating under the belief that the ISA rating was 60% NBS. They were not mistaken in that belief. The ISA rating was not incorrect simply because the later DSA ratings were incorrect.

Comments

Had the ISA been negligently prepared, then the outcome would have been very different here – as was acknowledged by the Court of Appeal.

A classic case of "Buyer Beware"?

It is unknown whether this decision will be appealed. However, the Court of Appeal's judgment appears to be a fair outcome – Tadd knew that the seismic rating was based only on an ISA, which had been supplied to them. This was a case of *caveat emptor* – buyer beware.

Caution for vendors and real estate agents providing third party information to purchasers

This case serves as another lesson for vendors and real estate agents about the need for extreme care in the

supply of information to prospective purchasers. Limitations of any information should be stated and disclaimers and/or exclusions of liability should be considered.

Engineers' disclaimers and limitations of liability

This also highlights for engineers (and other professionals) the need to always qualify professional opinions and to provide limitations of liability where possible.

The future of the ISA

More widely though, this case potentially raises broader questions for the use of ISAs. Can prospective purchasers place any reliance on an ISA? Will insurers accept an ISA as evidence of the seismic capacity of a building? Should building control authorities requiring an engineering assessment from an owner of a potentially earthquake-prone building accept an ISA or insist on a DSA? Even the outcomes of DSAs can vary between engineers.

The key takeaway is a reminder that a seismic assessment is ultimately an opinion, not a matter of fact. In most cases, an ISA might be sufficiently reliable, but there will be cases where an ISA does not uncover significant seismic issues, even if they are prepared with appropriate care and expertise.

Want to know more?

If you have any questions about contractual misrepresentation, reliance on seismic assessments or limitations of liability, please contact our specialist Litigation and Dispute Resolution Team.

⁴ At [48].

⁵ At [40].