

EXCLUDING LIABILITY FOR MIS-REPRESENTATIONS

The Court of Appeal in *Lloyd v Browning* (unreported 4/11/13) has recently held that where a buyer had been induced by oral misrepresentations to enter into a contract to buy a property, the seller could rely on a standard form of non reliance clause to avoid liability.

The buyer said that it had relied on oral representations from the seller about planning permission concerning a property. The contract for the sale of the property contained a clause stating that the buyer admitted that he had inspected the property, had entered into the agreement solely on the basis of his inspection, and had not been induced by any statement made by the seller, except for written responses by the seller's conveyancers to written pre-contractual enquiries made by the buyer's conveyancers. Such clauses are in common usage. After completion of the purchase the buyer became aware of the true state of the planning permission. At first instance the judge had found that the buyer had been induced by the sellers' oral misrepresentations and found that the buyer had thereby suffered a loss of £55,000 based on diminution of value. However, the judge held that the buyer's claim could not succeed because the seller was entitled to rely on the exclusion clause.

The Court of Appeal dismissed the appeal, finding that it was fair and reasonable for the seller to rely on the exclusion clause. Accordingly, there had been no breach of the reasonableness requirements set out in section 11 of the Unfair Contract Terms Act 1977.

The Court of Appeal considered that clauses in contracts for sale of land which excluded reliance on oral representations served a useful purpose as they helped to achieve certainty and to avoid disputes about the content of conversations. The fact that, as is commonplace in the context of the purchase of a property, the parties to the contract were legally represented and there was a negotiation as to the terms of the contract meant that the case was not one where a purchaser had been faced with a potentially unfair "take it or leave it" situation. It is also significant that the buyer, if he had wanted to rely on information from the seller about the planning permission, could have made a formal pre contractual enquiry which the vendor would then have answered in writing.

In coming to its decision the Court of Appeal applied *FoodCo UK LLP (t/a Muffin Break) & Ors v Henry Boot* [2010] EWHC 358 (Ch) where a property developer who owned a motorway service area provided prospective commercial tenants with estimates of future visitor numbers that were ten times greater than the actual figures. Leases were entered into containing acknowledgments that there had been no reliance on any representation other than written replies provided by solicitors. The Judge in *Foodco UK LLP* concluded (for reasons similar to those of the Court of Appeal in *Lloyds v Browning*) that the clause satisfied the reasonableness test in section 11(1) of the Unfair Contract Terms Act 1977 so that the tenants could only succeed if they could prove fraudulent misrepresentation.

When considering non reliance clauses, contracting parties and their advisors should keep in mind that the case of *Springwell Navigation Corporation v JP Morgan Chase Bank & Others* [2010]EWCA Civ 1221. That case held that parties can agree to assume that a state of affairs is in existence at the time that a contract is made even though the true state of affairs is known to be substantially different. Such agreements create contractual

estoppels that bind parties without there being any need to prove that it would be unconscionable for a party to resile from the agreed assumptions. It is important to note that the Court of Appeal in *Springwell* identified only a single class of cases where effect would not be given to contractual estoppels, namely where the enforcement of the estoppel would contradict public policy but it will only be in rare cases that considerations of public policy would be relevant.

The combined effect of the decisions in *Lloyd v Browning* and *Springwell* is that any party who enters into a contract with a clause which states that there have been no pre contractual representations or that no pre contractual representations have been relied upon should ensure that any representation that is in fact to be relied upon is repeated in writing in a form that is expressly agreed can be relied upon, ideally within the contract itself.

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