# Requirement for non-reliance clause to be reasonable upheld (First Tower Trustees Ltd and anor v CDS (Superstores International) Ltd)

10/07/2018

**Property analysis: Discussing the Court of Appeal decision in First Tower Trustees, Tom Merrick, senior associate at Lewis Silkin LLP advises that sellers and landlords need to take extreme care in ensuring that replies to pre-contract enquiries are accurate and up to date and be alive to the potential risks in enforcing non-reliance clauses.**

*First Tower Trustees Ltd and another v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396

## What are the practical implications of this case?

The case reinforces the advice to any seller or landlord to take extreme care in ensuring that replies to pre-contract enquiries are accurate and not misleading, not only at the date they are given but right up until the point a binding agreement is entered into. This would include making reasonable efforts to check its records, or asking the appropriate people within its organisation (*William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932). If any reply changes, the buyer or tenant needs to be notified. If not, a seller or landlord will leave itself open to a misrepresentation claim which may prove difficult to counter.

Replies to pre-contract enquiries are an important part of a property transaction upon which a buyer or tenant will place reliance in deciding whether to proceed. However, sale or lease contracts commonly contain a clause in which the buyer or tenant agrees that they have not relied on pre-contractual statements—known as a non-reliance clause. This is intended to enable the seller to resist a misrepresentation claim on the ground that the necessary component of reliance by the buyer is missing.

A seller or landlord would be unwise to assume they are sufficiently protected by such a clause. While it is designed to prevent a party from relying on statements made by the other party to the contract (except as permitted by the clause), it is subject to section 3 of the Misrepresentation Act 1967 (MA 1967) and thus the reasonableness test under section 11(1) of the Unfair Contract Terms Act 1977 (UCTA 1977). So, a seller or landlord will have to prove why the clause was reasonable. It is critical, therefore, that the clause is carefully drafted.

From a buyer or tenant's perspective, care should be taken in agreeing a non-reliance clause unless it is amended to allow for reliance on—for example, written replies given by the landlord's solicitors to the enquiries raised by the tenant's solicitors. Any attempt to take away the very purpose of pre-contract enquiries should be strongly resisted.

The case also reminds us of the importance of including a widely drafted trustee limitation provision when acting for trustees which extends to any connected non-contractual claims rather than limiting it to contractual liability.

The impact of the decision will not be limited to property transactions. Any clause which seeks to exclude liability in this way will be subject to a reasonableness test if a party seeks to rely on it as giving rise to contractual estoppel to counter a claim of misrepresentation.

## What was the background?

A lease of warehouse premises (bays 1-3) in Barnsley had been granted by a landlord, comprising two trustee companies, to a tenant. The tenant also entered into an agreement for lease in relation to

bay 4 on the same day. Almost immediately following completion, asbestos was discovered by the tenant. Remedial works were required resulting in the premises being unfit for occupation for about eight months and the tenant incurring additional costs in securing alternative accommodation.

Prior to entering into the documents, the tenant received replies to enquiries from the landlord. One of the replies confirmed the landlord had not been notified of any actual, alleged or potential breaches of environmental law, or any other environmental problems relating to the property. At the time this reply was given, it was correct.

It transpired that the landlord had subsequently received a report indicating the presence of asbestos in the premise as well specialist advice identifying a health and safety risk caused by asbestos near the loading bay. The landlord was therefore aware of the presence of asbestos prior to entering into the documents, but had failed to notify the tenant. The tenant carried out the remedial work to the premises, terminated the agreement and claimed damages for negligent misrepresentation.

The lease contained a non-reliance clause whereby the tenant acknowledged that the lease had not been entered into in reliance on any statement or representation made by or on behalf of the landlord. The landlord sought to rely on this.

The High Court held the landlord had misrepresented the condition of the premises and that this misrepresentation was material and had been relied upon. The court further held that the non-reliance clause was of no effect as it failed to satisfy the requirement for reasonableness in the UCTA 1977. The tenant was entitled to the full costs of the remedial works and alternative accommodation (subject to a reduction resulting from the tenant's delay in progressing the works). In addition, the court held the lease was effective to limit the trustees' contractual liability, but not liability for pre-contract misrepresentation. The landlord appealed the High Court decision to the Court of Appeal.

**What did the Court of Appeal decide?**

It agreed with the High Court decision that there was a misrepresentation, that the non-reliance clause was unreasonable and of no effect and that the trustees' limitation clause did not extend to pre-contract misrepresentation.

It was acknowledged that non-reliance clauses may be used to create what is referred to as a contractual estoppel, attempting to prevent a party from asserting that a particular state of affairs exists. However, the fact that a clause operates as a contractual estoppel does not prevent it from being subject to MA 1967, s 3. The effect of the clause in this case was not to define the basis on which the parties were dealing with each other, but was an attempt to exclude all liability for misrepresentation. It was, therefore, subject to the reasonableness test under the UCTA 1977. The importance of replies to pre-contract enquiries is well recognised and the fact that the clause prevented reliance on any statements at all, rendered the replies worthless. This was a key reason why the clause was held to be unreasonable.

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