Avoiding Misrepresentation

Paul Butt looks at misrepresentation in the context of conveyancing transactions and the attempts by sellers' conveyancers to draft contractual clauses avoiding such liability.

Background

It has been noticeable in recent years how much more 'risk-aware' conveyancers have become – no doubt as a result of commentators repeatedly telling them what a high risk area conveyancing is! And risk-awareness has quite sensibly developed into risk avoidance and avoiding (or trying to avoid!) the risks of misrepresentation has become universal.

A misrepresentation is an untrue statement made by one contracting party which is relied upon by the other, which induces him/her to enter into the contract, and as a result of which he/she suffers loss. Note in particular the requirement for loss to be established. Often this will be the reduced value of the property being purchased.

The statement will normally be one of fact, but an untrue statement of law can also be the basis of a misrepresentation; however a statement of opinion cannot. The classic situation where a misrepresentation may occur is when a prospective buyer is viewing the property and the seller makes various statements as to what a wonderful property it is, no doubt designed to try and persuade the viewer to become a buyer.

It is often as a consequence of the viewing(s) – and what is said at them – that the buyer decides to buy the property - and not as a result of statements made on the Law Society's Property Information Form. Unfortunately, the courts are consistently ruling against buyers being able to rely on such statements.

Contractual clauses trying to exclude responsibility for misrepresentation are the norm – sellers' conveyancers no doubt trying to avoid the risk not only of their client being liable but also being liable themselves to the seller in negligence for failing to include such a clause in the contract. Being risk aware again!

So the 5th Edition of the Standard Conditions of Sale (which have largely, but not completely replaced the 4th Edition in practice) contains the following clause as Special Condition 6 on the back page:

"Neither party can rely on any representation made by the other, unless made in writing by the other or his conveyance, but this does not exclude liability for fraud or recklessness."

Refinancing These conditions (and this clause) have been designed by the Law Society to present a fair balance between the interests of buyer and seller. And members of the Law Society's Conveyancing Quality Scheme are discouraged from adding further exclusions by the terms of the Protocol they are obliged to follow.

The Protocol States (at Step 24):

'Note: The addition of further clauses to the contract is discouraged. Further clauses should not be included unless they are necessary to accord with current law, or specific and informed instructions have been given by the seller that inclusion of such clauses is necessary and they are required for the purpose of the particular transaction.'

One has to say, however, that although most firms have embraced the Protocol, the addition of extra clause – including extra exclusion clauses - is not unknown.

The Law

The validity of such clauses depends upon the combined effect of the Misrepresentation Act 1967 and the Unfair Contract Terms Act 1967.

Section 3 Misrepresentation Act 1967 (as substituted) states:

a) 3. Avoidance of provision excluding liability for misrepresentation. If a contract contains a term which would exclude or restrict—

a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or

b) (b) any remedy available to another party to the contract by reason of such a misrepresentation, that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does.

Unfair Contract Terms Act 1977:

11.The "reasonableness" test

(1) *In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the Misrepresentation Act 1967 and section 3 of the Misrepresentation Act (Northern Ireland) 1967 is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.*

A similar clause to Special Condition 6 was litigated in ***Foodco UK LLP & Others v Henry Boot Developments Ltd [2010]*** EWHC 358, a case involving a dispute over a lease of units in a motorway service area. Here Lewison J (as he then was) gave various reasons for upholding the validity of the clause and preventing a claim made in reliance on oral representations:

177. I have no doubt that the non-reliance clause in the present case satisfies the requirement of reasonableness. I say that for the following reasons:

i. The aspiration of certainty is a reasonable one for the parties to adopt. In most cases it will have the effect of avoiding a twelve day trial such as this one.

ii. iThere was no substantial imbalance of bargaining power between the parties. Each of the tenants was a commercial and substantial concern….

iii. Each of the tenants was advised by solicitors….

iv. The term itself was open to negotiation.

v. Perhaps most importantly, the clause expressly permitted reliance on any reply given by the Henry Boot's solicitors to the tenant's solicitors. If, therefore, something of importance had been stated in the course of negotiations upon which the intending tenant wished to rely, its solicitors had only to ask Henry Boot's solicitors for an answer to a question.

That would have revealed whether Henry Boot was prepared to formalise the statement so that the tenant could rely on it or whether the tenant would have to undertake its own due diligence.

178. It follows, in my judgment, that the tenants can only succeed if they demonstrate that Henry Boot made fraudulent misrepresentations.

Then we had **Morgan v Pooley [2010] EWHC 2447**, a residential purchase. Here the exclusion clause was as follows:

"The Buyer acknowledges that this Contract has not been entered into by the Buyer in reliance upon any representations made by or on behalf of the Seller except those made in writing by the Seller's conveyancers prior to the date hereof as being representations upon which reliance is placed and such as were not capable of independent verification by the Buyer."

Edwards-Stuart J. held this was a valid clause.

115. This leads on to the question of whether the clause satisfies the test of reasonableness by virtue of section 3 of the Misrepresentation Act 1967. I would hold that in these circumstances of this case it does so.

Mr and Mrs Morgan, or at least their solicitors, knew of the clause and had every opportunity to challenge it if they had thought fit to do so.

Had that been done, Mr and Mrs Pooley might well have been advised to stand firm with the result that Mr and Mrs Morgan would not have pressed the point. It is difficult to say. But Mr and Mrs Morgan were obviously very keen on the property and on balance I consider that they would probably have accepted the non-reliance clause if it had been a sticking point.

In those circumstances it seems to me that the term is fair. What would not be fair would be to allow a purchaser to keep silent at the stage when he is presented with a draft contract containing the relevant term in a fairly prominent form, with plenty of time in which to consider it, and then to permit him to assert later that he should not be bound by the term.

118. I must emphasise that I reach these conclusions on the basis of the pleaded case. If fraud had been pleaded and proved, then different considerations would apply. But since Mr and Mrs Morgan have never alleged fraud or dishonesty by Mr and Mrs Pooley, I consider that the non-reliance clause must be considered against that background.

Two points immediately spring to mind here with regard to fairness. No suggestion that it might be unfair for a seller to say something to a buyer at the viewing that influences the buyer to buy and then use a contract clause which, in effect, says 'You cannot believe a word I have said'.

And note also that this clause did not even allow reliance on answers to the usual Property Information Form – reliance could only be placed on answers given by the seller's conveyancers, and the Property Information Form is completed by the seller personally. Also 'fair', apparently. One would suggest, however, that a buyer's conveyancer faced with a clause such as this must contest it to fulfill his/her duty to the buyer.

Latest Case

And now we come to the decision in **Lloyd v Browning [2013] EWCA Civ 1637**. This was a dispute over statements allegedly made about the extent of a planning consent granted in respect of the property being sold. The contract included a clause in the form promulgated by Eastbourne Law Society which was to all intents identical to the current Special Condition 6 of the Standard Conditions. And it was upheld by the Court of Appeal. It was held to be 'reasonable' for the following reasons:

- both sides had legal advisers; in addition, the claimants had retained architects and planning consultants; there was therefore no imbalance of bargaining power;
- contracts for sale of land are universally understood to be formal documents in which all of the terms which the parties have agreed have to be set out in writing;
- the case was not one of an individual consumer who had been forced to contract on standard terms that were hidden away in small print; the special condition had been in a contract negotiated by the lawyers;
- the clause was one promulgated by a local branch of the Law Society and was used in the area; the clause did not therefore seek to advance the interests of sellers over buyers;
- if the claimants had wanted to rely on the substance of the oral representations made to them, the exclusion clause permitted them do so as they could have insisted on written assurances as to the extent of the planning permission from the defendants' conveyancers.

So even though there had been a misrepresentation which resulted in a difference in value of the land of £55,000, the buyer was without a remedy because of this valid non-reliance clause.

Conclusion

So what lessons can we learn from all this? Firstly, it would appear that Special Condition 6 is valid. But, following the earlier cases, it will not exclude liability for fraud or dishonesty – but that is always going to be difficult to prove. Proving that a statement made is incorrect is one thing; proving that the seller knew it to be incorrect is another and is very rarely alleged in the case law. The moral must be two-fold. Those advising sellers must clearly advise their clients that all answers to questions raised by the buyers – including the Property Information Form, must be truthfully answered. In this case, the seller won – but would he/she recover all the costs incurred in defending the buyer's claim. And this ignores the stress and worry and time spent in defending. If the answers are correct, this should avoid all the problems for buyers and sellers illustrated in the case law.

Those advising buyers must, at an early stage in the transaction, advise their clients that they cannot rely on anything that has been said to them by the sellers when they were viewing or negotiating for the property. Therefore, if there was anything that was said to them that influenced their decision to buy, no matter how slightly, then they should immediately advise their conveyancers so that a written representation can be obtained. Of course, if the seller refuses to give a written representation, the buyer will clearly know where he/she stands!

Failure to advise buyers that they cannot rely on oral representations could in itself amount to negligence by the buyer's conveyancer. So in such a case, the buyer might not have a remedy against the seller, but would against his/her own conveyancer. As we have said many times before, conveyancing is a risky business!

Paul Butt LLB is a Solicitor and a Consultant with Rowlinsons Solicitors, Frodsham.

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