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Legal Update
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Purchasers of luxury houseboats find themselves in deep water before High Court sails to the rescue – the heart of the transaction prevails

Introduction

A dispute involving the sale of luxury houseboats has recently been heard by the High Court of England and Wales. The judgment considers important issues concerning the inter-relationship between pre-contract representations and entire agreement clauses.

Background

Two families (the Smalls and the Johnstone-Sydneys, together, the "**Buyers**") each agreed to purchase a luxury houseboat from Mr Djurberg (the **"Seller"**) who owned and managed a boatyard and marina known as "Hampton Riviera". The purchase price for the houseboats was £1.25 million (in respect of the Smalls' purchase) and £850,000 (in respect of the Johnstone-Sydneys' purchase).

The Buyers claimed that, prior to completing the purchases, they had relied on representations made by the Seller that their purchases included long-term mooring rights so that they could moor their houseboats at Hampton Riviera and lawfully occupy them as their permanent homes.

The Buyers also claimed that these representations became terms of the contract. However, the contractual documents made no specific mention of long-term mooring rights being granted and contained no express representation that the houseboats could be used as permanent residences at Hampton Riviera.

Shortly after the purchases completed, the Seller sought an additional (and substantial) premium from the Buyers for long-term mooring rights. The Seller claimed that the price paid for the sale of the two houseboats had not (despite what the Buyers believed) included any mooring rights, which were subject to an additional cost.

The Buyers were unable to meet these unexpected additional costs (and other ancillary costs) sought by the Seller.

The Buyers also learnt, following discussions with the local planning authority, that the houseboats could not be used as permanent residential dwellings at Hampton Riviera.

The Buyers claimed damages for misrepresentation pursuant to section 2(1) of the Misrepresentation Act 1967 and for breach of contract. They also claimed damages for negligence on the part of the Seller.

The case was heard by Mr M H Rosen QC (sitting as a deputy High Court judge) and judgment has now been handed down.

The judgment

THE MOORING LICENCES

The Seller argued at trial that there were no concluded contractual promises to the Buyers that their respective properties could be lawfully moored for permanent residential use (without further charge) and that it was not the function of the Court to rewrite poor bargains.

The Seller's case focussed narrowly on the terms of the signed documents, but the judge did not regard the written record as comprehensive.

The judge noted the views expressed by Steyn LJ[1] that *"A theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or a principle of law. It is an objective which has been and still is the principal moulding force of our law of contract".*

1 *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] BCLC 1409

He concluded that there could not be any legitimate dispute that the Seller was well aware that the Buyers were selling their existing homes and that they were purchasing the houseboats in order to reside permanently at Hampton Riviera. The marketing particulars had also stated that the houseboats were offered for sale with 125-year mooring licences.

The Seller pointed out that the sale documents did not grant any mooring rights. The judge was unimpressed by this, concluding that the Seller had "*caused and allowed the Buyers to proceed on the basis that they had secured, as part of the very large sums they paid, moorings at Hampton Riviera*" and that such moorings did form part of the sale and purchase of the houseboats. The "*fundamental basis for the sale and purchase of the houseboats*" was for the Buyers and their families to live in them at Hampton Riviera. The judge also noted that the subsequent behaviour of the Seller "*not only smacks of sharp practice, but flies in the face of commercial common sense*".

Whether or not the representations made by the Seller became contractual terms turned on the intention of the parties, objectively ascertained from all the evidence. Although the judge held that the representations did form part of the contract, he did not consider that this added anything to the claim for misrepresentation and he did not set out his reasoning in any detail.

EFFECT OF ENTIRE AGREEMENT CLAUSE

The Seller relied on an entire agreement clause in the construction contract (one of the contractual documents entered into in relation to the Johnstone-Sydneys' purchase). The clause stated that:

> *"This Agreement forms the entire agreement between the Parties and unless specifically agreed by the Designer/Builder in writing after the date of this Agreement, no warranty, condition, description or representation is given or to be implied by anything said or written in the negotiations between the Parties or their representatives prior to this Agreement".*

The judge held that the construction contract (i.e. "this Agreement") only related to building the houseboat and did not capture the wider transaction – as to which the mooring rights were basic to the parties' bargain. As a matter of interpretation, the entire agreement clause did not exclude any representations and promises that the houseboat benefitted from long-term mooring rights.

But if the entire agreement clause had covered those representations and promises, it would only have been effective if it satisfied the reasonableness test[2] in section 11 of the Unfair Contract Terms Act 1977 (**"UCTA"**). He approached this in two ways:

1. Insofar as the clause purported to exclude liability by reason of any misrepresentation, the effect of Section 3 of Misrepresentation Act 1967 Act is that it would be of no effect except insofar as it satisfies the reasonableness test; and
2. Insofar as the clause purported to entitle the Seller to perform the contract in a way which was substantially different from what was reasonably expected of him, then Section 3(2)(b)(i) of UCTA (regarding written standard terms) makes it subject to the reasonableness test.

The judge referred to *AXA Sun Life Services Plc v Campbell Martin Ltd*[3] in which the Court of Appeal had confirmed that the above sections can apply to entire agreement clauses.

The reasonableness test was not satisfied on the facts, taking into account the weak bargaining position of the Buyers and how the pre-contract negotiations had been conducted.[4]

COMMON LAW DUTY OF CARE

In addition to the claims for misrepresentation and breach of contract, the Buyers had also alleged that the Seller owed them a duty of care at common law.

It was not necessary for the judge to deal with this in any detail, but he took the opportunity to restate the principle that such a duty will generally not arise between a buyer and seller, save in exceptional circumstances where a "*special relationship*" exists between them. Such a relationship may arise where a person has (or professes to have) special knowledge or skill and makes a representation in respect of that knowledge or skill to another which induces that other person to enter into a contract with him.[5]

The judge held that neither the Buyers' enthusiasm and possible naivety, nor the Seller's presumed knowledge, justified finding that the Seller owed the Buyers a duty to advise them on the terms of their purchase, on which they could have taken their own advice.

2 Section 11 of UCTA states that a term satisfies the reasonableness requirement if "*it is 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 contemplation when the contract was made*".

3 [2011] EWCA Civ 133

4 The judge also reached the conclusion that the entire agreement clause could not stand by reference to the concept of fairness in the Unfair Terms in Consumer Contracts Regulations 1999.

5 *Esso Petroleum v Mardon* [1976] QB 801 (CA).

Comment

This judgment serves as a useful reminder of some of the general principles regarding misrepresentation and when representations become contractual terms, and that a duty of care at common law will not normally arise between a buyer and a seller.

The case is also an important reminder that entire agreement clauses will not necessarily reduce the terms of an agreement to what is expressly contained within a written document. In that regard, when including entire agreement clauses in a contract, consideration should be given to:

1. whether the agreement in which the clause is situated relates to the entirety of the transaction or only a specific element of the transaction – in which case, consideration should be given to whether the other contractual documents contain similar or identical provisions;
2. any fundamental terms of the contact that have been agreed between the parties but have not been included in the written contractual documents (e.g. oral terms or agreements reached over email); and
3. whether the clause potentially falls foul of the Unfair Contract Terms Act 1977 or the Unfair Terms in Consumer Contracts Regulations 1999.

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