First Tower Trustees Ltd (2) Intertrust Trustees Ltd v CDS (Superstores International) Ltd (2017) (CHANCERY DIVISION)

1. Summary

A landlord was liable for the cost of remedial works to remove asbestos and of alternative warehouse accommodation whilst those works were carried out where it had misrepresented to the tenant, in its replies to pre-contract enquiries, that it had no knowledge of any environmental problems affecting the property. A clause in the lease which purported to exclude liability for reliance on any statement made by the landlord failed the test of reasonableness under the Misrepresentation Act 1967 s.3.

2. Facts

The court had to consider a counterclaim brought by a commercial tenant for damages relating to losses resulting from the unavailability of premises due to asbestos damage.

The claimant landlord, a trustee company, leased warehouse premises to the tenant. By cl.5.8 of the lease, the tenant acknowledged that it had not entered into the lease in reliance on any representation made by the landlord. The lease also provided that the landlord contracted in its capacity as trustees of a specified trust and not otherwise. In its replies to pre-contract enquiries, the landlord stated that it was unaware of any environmental problems relating to the property. The lease completed on 30 April 2015 and the tenant took possession on 6 May. It began various works pursuant to a pre-condition of the lease. On 14 May, asbestos was discovered. Remedial works commenced in November 2015 and the premises were ready for occupation on 15 January 2016. The landlord abandoned a claim for unpaid rent, leaving the tenant's counterclaim for damages for the period 1 May 2015 to 15 January 2016 to be determined. The tenant claimed that it had entered into the lease on the basis of the landlord's representations that there were no problems with asbestos at the premises, whereas, in fact, the landlord had become aware on 16 and 20 April 2015 of reports indicating the presence of asbestos. The landlord denied prior knowledge of the presence of asbestos. It also claimed that the trustees' liability was limited to the extent of the trust assets.

3. Held

(1) Although the lease was subject to the usual implied covenant of the landlord not to derogate from grant, there had been no act or omission by the landlord after the grant of that lease which derogated from its grant or interfered with the tenant's quiet enjoyment of the premises. The interference which arose was the tenant's inability to occupy the premises until works had been carried out

pursuant to the pre-condition, Southwark LBC v Mills [2001] 1 A.C. 1 followed (see paras 18-20 of judgment).

(2) The landlord had made false representations to the tenant about the presence of asbestos and the need for substantial remedial works to deal with the problem. Those misrepresentations were material and had been relied upon by the tenant. Although a clause which was part of the basis upon which the parties had contracted was not treated as an exclusion or exemption clause and was not subject to statutory control, the non-reliance clause at cl.5.8 of the lease was an attempt retrospectively to alter the character and effect of what had gone before and was therefore in substance an attempt to exclude or restrict liability, Springwell Navigation Corp v JP Morgan Chase Bank (formerly Chase Manhattan Bank) [2010] EWCA Civ 1221 followed. The Misrepresentation Act 1967 s.3 was therefore engaged and the burden was on the landlord to show that cl.5.8 satisfied the test of reasonableness. Given the well-recognised importance of pre-contractual enquiries, it was highly unreasonable for the landlord to withhold, in its replies to those enquiries, knowledge of a serious problem. There was therefore no impediment to liability in respect of the misrepresentation (paras 12, 15, 30-31, 33-35, 38, 41).

(3) The tenant was entitled to the full costs of the asbestos remedial works and the costs of alternative warehouse accommodation whilst the premises were incapable of use. However, the length of that period resulted in part from the tenant's delay in progressing the works, which should have commenced by 16 September 2015. A reduction was made accordingly (paras 42, 44-46).

(4) With regard to the trustees' liability, there was no reason not to give the words of the lease their clear meaning. The limitation of liability was a reasonable one and it had been open to the tenant to challenge it if it thought fit. However, the clause did not purport to limit liability for pre-contract misrepresentation. Therefore, the trustee limitation provisions were effective only to limit the landlord's contractual liability to the extent of the trust assets but did not limit the claim in misrepresentation. Although a claim under the 1967 Act resulted in a contract between representee and representor, it did not follow that a limitation of contractual liability extended, without words to that effect, to pre-contractual liability. Accordingly, the misrepresentation claim relating to the replies to enquiries was not limited, as against the tenant, to the extent of the trust fund (paras 54, 56, 58-59).

Chancery Division
Michael Brindle QC

4. JUDGMENT DATE

20 February 2017

5. REFERENCES

6. Members

Edwin Johnson QC

First Tower Trustees Ltd v CDS (Superstores International) Ltd (2018) (COURT OF APPEAL)

1. SUMMARY

Contractual estoppel and non-reliance clauses were not immune from scrutiny under the Misrepresentation Act 1967 s.3. Such clauses could not prevent liability arising if they failed to satisfy the reasonableness test under the Unfair Contract Terms Act 1977 s.11(1). Accordingly, a landlord was not permitted to rely on a clause in a lease restricting its liability for representations, where it had misrepresented to the tenant that it had no knowledge of environmental problems affecting the property, when in fact it was aware of asbestos problems.

2. Facts

A landlord (two trustee companies) appealed against a decision that it was liable to the tenant for misrepresentation.

The landlord had leased warehouse premises to the tenant. By cl.5.8 of the lease, the tenant acknowledged that it had not entered into the lease in reliance on any representation made by the landlord. The lease also provided that the landlord contracted in its capacity as trustees of a specified trust and not otherwise. In its replies to pre-contract enquiries, the landlord stated that it was unaware of any environmental problems relating to the property. However, the landlord was aware of asbestos contamination in the warehouse. Remedial works were necessary to deal with the contamination, and the tenant had to lease alternative premises while those works were carried out. The judge found that the tenant had entered into the lease on the basis of the landlord's misrepresentation that there were no problems with asbestos at the premises. He also concluded that cl.5.8 was an attempt to exclude liability for misrepresentation, but it did not satisfy the test of reasonableness under the Unfair Contract Terms Act 1977 s.11(1). He rejected the landlord's argument that their liability was limited to the extent of the trust's assets.

3. Held

Clauses falling under the Misrepresentation Act 1967 s.3 - Parties could bind themselves by contract to accept a particular state of affairs even if they knew that state of affairs was untrue. That was known as contractual estoppel and, unlike most forms of estoppel, it required no proof of reliance other than entry into the contract itself, Springwell Navigation Corp v JP Morgan Chase Bank (formerly Chase Manhattan Bank) [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705followed. However, the position at common law was not the end of the enquiry, as it was necessary to consider whether there was a statute to the contrary, Thornbridge Ltd v Barclays Bank Plc [2015] EWHC 3430 (QB) disapproved. It was wrong to suggest that the mere fact of a contractual estoppel was, in itself, a complete answer to s.3, or that a non-reliance clause was immune from scrutiny under s.3, Sears v Minco Plc [2016] EWHC 433 (Ch) disapproved. Section 3 had to be interpreted to give effect to its evident policy, which was to prevent contracting parties from escaping liability for misrepresentation unless it was reasonable for them to do so, Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123applied. However, where, as a matter of interpretation of a non-consumer contract, the impugned term did no more than describe one party's primary obligations, there could be no question of applying the reasonableness test. Such a term was a "basis clause" (see paras 42-44, 47-51, 59, 66, 90, 111-112 of judgment).

Per Leggatt LJ) Whether a contract term excluded liability for breach, or merely showed that no relevant contractual obligation had been undertaken, was a question of construction of the contract. However, there was no good reason to interpret s.3 in a way which omitted the latter type of term from its scope (paras 89-112).

Did cl.5.8 fall within s.3 of the 1967 Act? Yes. Absent the clause, the landlord would have been liable for misrepresentation. The only reason it might not be liable, was the existence of cl.5.8. The clause was therefore a contract term which would exclude liability for misrepresentation, if it satisfied the requirement of reasonableness under the s.11(1) of the 1977 Act (paras 40-41, 67).

Was cl.5.8 reasonable under the 1977 Act? No. The judge was right to stress the importance of pre-contract enquiries in the field of conveyancing, and right in his conclusion. If cl.5.8 governed the landlord's liability, the important function of replies to enquiries before contract became worthless. Although there might be a case where, on exceptional facts, a clause precluding reliance on replies to enquiries before contract might satisfy the test of reasonableness, even where those replies were in fact relied on, it was very hard to imagine what those facts might be, Lloyd v Browning [2013] EWCA Civ 1637, [2014] 1 P. & C.R. 11followed (paras 68-76).

Was the landlord's liability limited to the extent of the trust fund? No. A person who entered into a contract in the capacity of trustee could limit his contractual liability to the extent of the trust fund, and would incur no personal liability in excess of the fund, provided that suitable words were used, Muir v City of Glasgow Bank (In Liquidation) (1879) 4 App. Cas. 337 followed and Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd [2018] UKPC 7, [2018] 2 W.L.R. 1465 applied. The lease had stated that the landlord was contracting as trustee and not otherwise. That was effective to limit the landlord's personal liability in contract. The question was whether it also served to limit the landlord's liability for damages in tort or damages payable under s.2 of the 1967 Act. English law did not recognise a trustee as having limited capacity or liability vis-à-vis a third party. That was also true of a liability for damages payable by statute. The default position was that a trustee was personally liable for damages for misrepresentation, which were not damages recoverable in contract. If the contract sought to remove a common law remedy, it had to be clearly done. The form of words in the lease had not done so in the instant case (paras 78, 82, 84-85).

Appeal dismissed

Court of Appeal
Lewison LJ, Leggatt LJ, Sir Colin Rimer

7. JUDGMENT DATE

19 June 2018

8. REFERENCES

LTL 19/6/2018

9. Members

Edwin Johnson QC