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Non-reliance clauses and replies to enquiries

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Question



“When are the courts ready to strike down non-reliance clauses, following the recent court of appeal decision in *First Tower Trustees Ltd v CDS (Superstores International)*?”

What?

- Background - *First Tower Trustees Ltd v CDS (Superstores International)* CA 2018
- When do non-reliance clauses amount to exclusion clauses?
- When are non-reliance clauses reasonable?
- Conclusions and practical implications

First Tower Trustees - the background



- Bays 1-4 Dearne Mill, Barnsley:



- DD and replies to enquiries

CPSEs – interpretation



- Boilerplate
- Inspect
- All docs relevant to enquiries
- Update



- CPSE 15.4 (b) hazardous substances:
- "The Buyer must satisfy itself".
- CPSE 15.5 notices of environmental problems:
- **"The Seller is not aware of any such notices etc. but the Buyer must satisfy itself".**

CPSEs (2)



- CPSE 15.7: any actual, alleged, or potential environmental problems.
- **"The Seller has not been notified of any such breaches or environmental problems ...but the Buyer must satisfy itself"**

Asbestos...



- Post replies, pre-exchange – new reports:



- No updating
- Completion...and claim!

Non-reliance



- Misrep
- Non-reliance:

Lease: *"The tenant acknowledges that this lease has not been entered into in reliance wholly or partly on **any** statement or representation made by or on behalf of the landlord."*

Agreement: *"...save for statements and representations made in writing by the Landlord's solicitors in response to the Tenant's solicitors' written enquiries."*

Exclusion clause?



- **Is a non-reliance clause an exclusion clause?**
- Basis clause or exclusion clause?
- What is a basis clause?
- Primary obligations

Exclusion clause test



- Test: "what would have been the position had the clause not been included in the lease?"
- "an attempt retrospectively to alter the character and effect of what has gone on before" (*Springwell* [2010])
- Non-reliance clauses are exclusion clauses

Misrepresentation Act



- Why does it matter?



- S.3 MRA '67
- Exclusion clauses must be reasonable to be effective.

Contractual Estoppel



- Contractual estoppel?
- Does exist but...
- Don't stop at non reliance clause...statute overrides contract.

Reasonable?



- S. 11 UCTA '77 – reasonable in all the circumstances?
- bargaining power
- legally advice
- negotiation
- ...so clause reasonable??

Reasonable?



- No! **Absolute** non-reliance is not reasonable.
- "...the landlord can say what he likes in replies to inquiries (fraud apart), withholding his own knowledge of a serious problem and requiring the tenant to carry out his own due diligence, and then meet the tenant with a contractual estoppel. That seems to me highly unreasonable, particularly in the conveyancing world, where pre-contractual inquiries have a particular and well-recognised importance. With clause 5.8 they become a worthless, and indeed positively misleading, exercise. **I do not think this is reasonable.**"

Conclusion



- 1. Non reliance clauses are exclusion clauses
- 2. ...as exclusion clauses they must be reasonable to be effective
- 3. Only reasonable non reliance clauses work



Practical implications



- Moral 1: Don't rely on non-reliance clauses!
- Moral 2. Be careful with replies to enquiries :
 - a) check boiler plate to CPSEs
 - b) check accurate; and
 - c) update!
- Moral 3: Widen you non-reliance clauses
- Moral 4. Silence is golden

Contact



- Any Questions?

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