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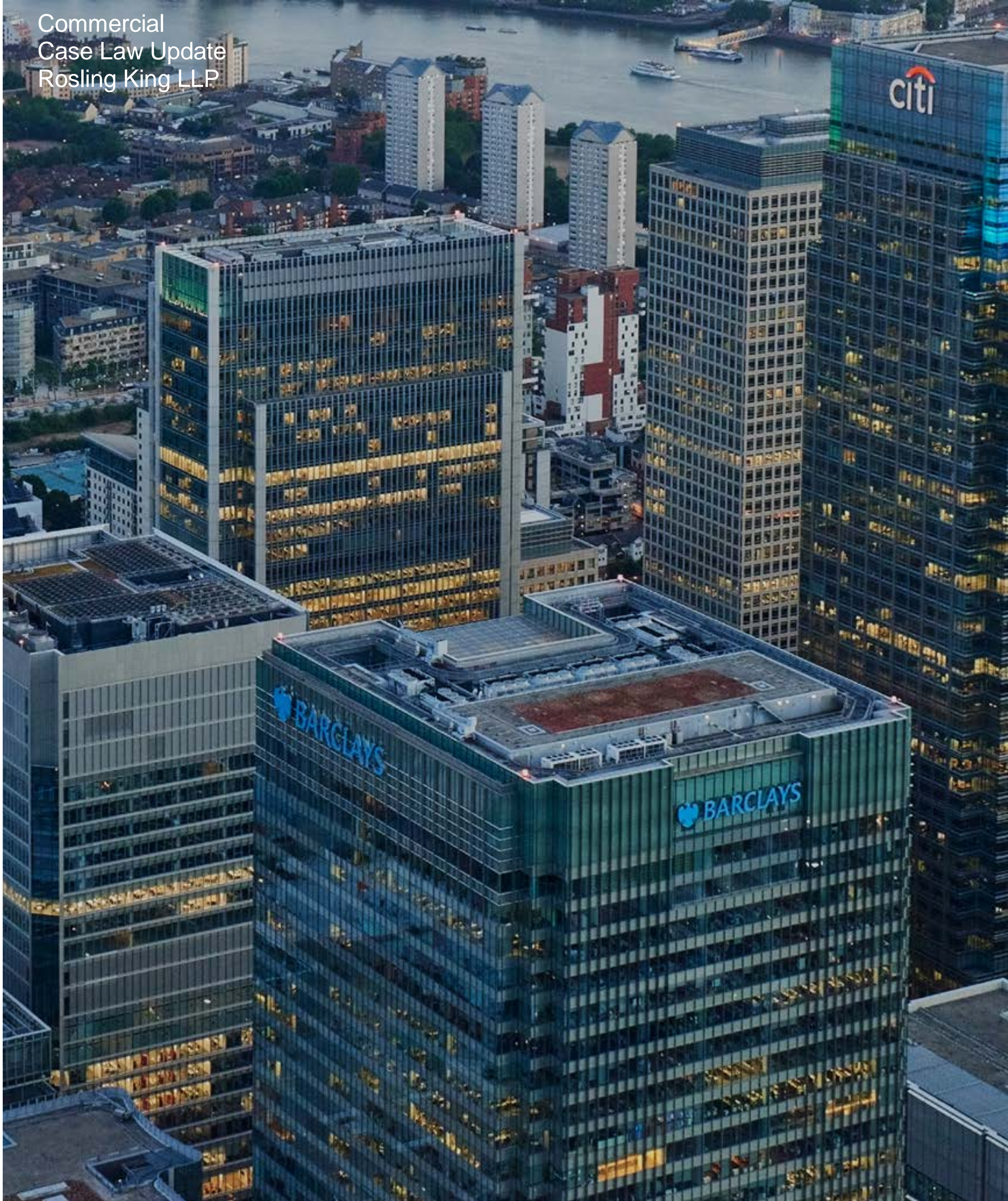

Commercial Case Law Update

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In this recent case, the Court of Appeal held that non-reliance clauses contained in a lease and agreement for lease amounted to an attempt to exclude liability for misrepresentation. This meant that the clauses were subject to the reasonableness test under the Unfair Contract Terms Act 1977. The case also serves as a reminder of the key role of pre-contractual enquiries in conveyancing transactions.

Background

Under section 3 of the Misrepresentation Act 1967 (the "**Misrepresentation Act**"), a contract term which excludes or restricts liability for misrepresentation, or which excludes any remedy for misrepresentation, is enforceable only to the extent that it satisfies the reasonableness test under the Unfair Contract Terms Act 1977 (the "**UCTA**"). The reasonableness test under the UCTA is assessed at the point when the contract was made and considers whether it was fair and reasonable to include the term in the contract, bearing in mind everything the parties knew or should have reasonably contemplated when they entered into the contract. The Misrepresentation Act does however provide a defence to a claim for misrepresentation, if it can be shown that the representor had reasonable grounds to believe in the truth of the misrepresentation.

Facts

The appeal relates to a misrepresentation which preceded the grant of a lease of Bays 1-3 of a warehouse in Barnsley and entry into an agreement for lease of Bay 4 of the warehouse at the same time. In both cases, unknown to the tenant, but known to the landlords or their agents, the Bays were so contaminated with asbestos that they were dangerous to enter.

In the usual way, the tenant raised enquiries through its solicitors on a Commercial Property Standard Enquiries ("**CPSE**") Form. Enquiry 15.4(b) asked for details of the existence of any hazardous substances including asbestos or asbestos containing materials. The response was: "*The Buyer must satisfy itself*". Enquiry 15.5 asked for details of notices, correspondence relating to real or perceived environmental problems that affected the property. The reply was: "*The Seller is not aware of any such notices etc but the Buyer must satisfy itself*". Enquiry 15.7 asked for details of any actual, alleged, or potential environmental problems relating to the property. The answer was: "*The Seller has not been notified of any such breaches or environmental problems relating to the Property but the Buyer must satisfy itself*".

Subsequently, the landlord's agents received a copy of a report which indicated that there was asbestos in Bays 1-3 and later an email from a specialist firm they had used, which reported a health and safety risk caused by asbestos near the loading bay of Bay 4. The interpretation clause of the CPSE Form contained an obligation on the landlord to provide the tenant with all documents and correspondence relevant to the replies; however, none of the information relating to the asbestos issues was passed to the tenant before completion of the lease and agreement for lease. Instead, the tenants were given, before contract, a copy of another report which indicated that there was no problem with asbestos at the Bays. The landlord asserted that this report in fact related to quite different property. How this apparent

mix-up happened is a mystery, but the courts were not required to make any findings about that.

The Decisions

It was accepted at first instance and on appeal that the representations were false on the basis that the landlord had said nothing about the asbestos problem. The landlord throughout sought to rely on the exclusion of the liability for the misrepresentation under the following clauses:

- clause 12.1 of the Agreement for Lease which provided that: "*The Tenant acknowledge and agree [sic] that it has not entered into this Agreement in reliance on any statement or representation made by or on behalf of the Landlord other than those made in writing by the Landlord's solicitors in response to the Tenant's solicitors' written enquiries*"; and

- clause 5.8 of the Lease which stated that: "*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*".

Each clause sought to limit the liability for representations and was therefore subject to section 3 of the Misrepresentation Act and the reasonableness test under UCTA. The test for reasonableness is an evaluation made by the court with reference to various factors; including whether there were legal advisors on each side, whether the contract has a status of formality (as contracts for land do with prescribed terms), whether the specific exclusion was non-negotiable or whether the terms permit the reliance on written statements.

The last point was particularly emphasised in this case by the High Court judge when he held Clause 12.1 was reasonable. However, this did not extend to Clause 5.8 because if he were to find clause 5.8 to be reasonable, this would render the well-recognised importance of pre-contractual enquiries worthless and positively misleading. The judge added that he suspected that conveyancing practitioners would be "appalled if such clauses gained wide currency and were upheld by the courts".

The landlord appealed but the Court of Appeal unanimously upheld the High Court decision. The Court of Appeal applied the same reasoning and consequently held that both clauses were subject to the UCTA test of reasonableness. Further, the Court of Appeal stated that the judge was right to stress the importance of pre-contract enquiries and thus the landlord did not limit its liability for the misrepresentation in relation to clause 5.8.

Commentary

This case is a helpful reminder of the importance of pre-contractual enquiries. The Court of Appeal did comment there might be a case where, on exceptional facts, a clause which precludes reliance on replies to enquiries might be held to satisfy the test of reasonableness even where those replies have in fact been relied on. However, the Court added it would be very hard to imagine what those facts might be. Additionally, it is interesting to note that the

supply of the report which appeared to give Bays 1-4 a clean bill of health was itself a misrepresentation, although it was not contained in replies to enquiries. Where there has already been such a misrepresentation, the Court of Appeal said it is all the more important for a buyer or tenant to be able to rely on the more formal answers to enquiries before contract.

For further information, please contact Alexander Pelopidas or the Partner with whom you usually deal.