

MISREPRESENTATION AND REPLIES TO ENQUIRIES

by

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PURDUE v VIKTOR

Mr and Mrs Viktor used to live at 2 Newbridge Road, Henley on Thames, and had done so for many years. The house is adjacent to a lane over which a number of neighbouring properties, including the owners of 2 Newbridge Road, have a right of way. At the end of the lane is a house owned by **Mr Jones**, known as New House. In the rear part of 2 Newbridge Road there were some garages but in **2002** Mr and Mrs Viktor had them knocked down to make a larger garden. At the same time they had their kitchen completely rebuilt. In doing the works the builders had access to the kitchen from the lane.

Dispute?

Opposite the old garages at the rear of 2 Newbridge Road (now the garden), there is a set of three garages, all owned by Jones. Jones is the sort of man who loves his cars. He hates it if anyone parks so that he can't get straight into the garage.

During the works to no.2 there were a number of problems. He could get in and out of his garages but it was often a bit more difficult. Instead of politely asking the workers to move their vehicles he was very aggressive. Jones would get very worked up and often swear at them. Mr and Mrs Viktor did not get directly involved and never actually spoke to Jones about it but it was clear that Jones was very resentful at Mr and Mrs Viktor.

Divorce

In **2008** Mr and Mrs Viktor separated and by **2010** they were divorced. As part of the divorce settlement, the house was transferred to Mrs Viktor. She was originally hoping to stay in the house but in **September 2010** decided to sell up. Fortunately, she found purchasers fairly quickly: **Mr and Mrs Purdue**. They have two young children, aged 5 and 7 so they were very pleased with the garden. They also particularly liked a water feature in the garden which was obviously new and quite expensive to put in.

Dispute or complaint?

When asked to do so Mrs Viktor filled out a Property Information Form and answered "No" to the following question:

"Have there been any disputes or complaints regarding this property or a property nearby?"

As far as Mrs Viktor was concerned there was no dispute with Mr Jones about either her property or his property. Indeed, they had not directly received any complaints from Mr Jones. The builders might have done but that was nothing to do with them.

The sewer pipe

The form also contained the following question:

“Are there any other formal or informal arrangements which someone else has over the property?”

To each of these questions Mrs Viktor wrote “not so far as the seller is aware”.

In fact there is a sewer pipe running across the back garden of no 2, which serves no.4. There is no express easement relating to this sewer shown on the property register but it was put in about 15 years ago with the written permission of **Mr Viktor**. A copy of the letter is in a file dealing with matters relating to the house, which Mrs Viktor has in her filing cabinet. In answering “not so far as the seller is aware” Mrs Viktor was being perfectly honest because she was not aware of, or at least did not remember anything about, the sewer. This is not surprising because she did not deal with it at the time. However, she did not check through the files and so did not come up with the letter.

Dry rot

An additional question asked was:

"Has the property been affected by any of the following at any time; woodworm, rising damp, wet or dry rot or other infestation?"

The reply given by Mrs Viktor was as follows:

"The seller is not aware of any such matters. However, the purchasers must rely upon their own inspection and survey."

Mr and Mrs Purdue employed a surveyor to carry out a full structural survey. One of the limitations in the letter of engagement said: "We may not be able to lift fitted floor coverings. Should we decide that further exploratory works are required, we will advise you accordingly."

When the surveyor visited the house he noticed that the staircase was new and asked about it. Mrs Viktor told the surveyor that there had been dry rot in the old staircase. It had therefore been replaced about a year ago. In his report to Mr and Mrs Purdue the surveyor told them about the new staircase and what Mrs Viktor had said. The report went onto to state:

"We recommend that you contact the specialist firm employed by Mrs Viktor to replace the stairs and ascertain from them the extent of the dry rot that was present and the full nature of the remedial works carried out by them."

Mr and Mrs Purdue thought about it but then decided not to contact the firm. In light of the fact that the Mrs Viktor had replaced the staircase they were happy with her reply that she was not aware of any dry rot. There were no other matters in the survey which gave rise to any concern.

Parking

When Mr and Mrs Purdue looked at the house, they noticed that there was a school just 100 yards down the road. This made them concerned about being able to park outside the house. They were particularly worried about this because the house had no drive and of course no garage. They therefore asked their solicitors to write to Mrs Viktor's solicitor saying: "**Are they any problems parking outside the house?**" The reply given was: "No."

During most of the day it is not too difficult to park outside the house but between 8.30 and 9am and 3.15pm to 3.45pm, it is almost impossible to do so because of the parents bringing and collecting their children to school. Mrs Viktor was not really aware of this because she did not tend to come back to park at these times and on the occasion when she was not able to park right outside she drove round the corner and walked back to the house (about 200 yards). She had not found that to be a problem.

The sale then went ahead to Mr and Mrs Purdue at the beginning of the **Christmas school holidays 2010** using the Standard Conditions, 4th edition.

After the sale

Mr and Mrs Purdue were very happy with the house. However, they were concerned because the **water feature** that had been in the garden when they inspected was now gone.

Once school started in **January 2011** Mrs Purdue often found it difficult to park. Her children don't go to the state school across the road but to a private school on the other side of town. When she comes back the parents of the local school are still there and there are no spaces outside the house. She nearly always has to **park round the corner**.

At the end of the garden there is a gate directly out onto the lane. If one comes in through that gate it is possible to go straight through the garden and into the kitchen. One day at about 4pm when she was coming back from collecting the children from school, **about a month after** moving into the house, Mrs Purdue could not park outside the house because there were no spaces. She therefore drove down the lane and stopped just outside the gate with her shopping and started to unload. Unfortunately, just at that moment Mr Jones came along in his Rover and could not get past. He immediately got out of his car and started to shout at Mrs Purdue. This caused the children to cry and Mrs Purdue got very upset.

About three weeks later it was difficult to park outside the house once again and so Mrs Purdue stopped by the gate. This time she pulled her car close to the wall so that she was not blocking the lane. As luck would have it Mr Jones came by again just at that moment, this time in his 4x4. He could have got past if he tried but he would have had to be careful. However, he didn't try. Once again, he got out of his vehicle, shouted and swore at Mrs Purdue in front of the children.

That evening, Mr Purdue tried to smooth matters over by going round to Mr Jones' house but all he got was a load of abuse. Mr Purdue went home deflated.

A further problem arose at the weekend. They detected a funny smell but were not sure what it was. It smelt like drains. Then the children came in from the garden with dirt on their hands which smelt horrible. Mr and Mrs Purdue went out into the garden and noticed a patch in the middle of the lawn. To cut a long story short the **sewer pipe underneath the garden** had cracked and was leaking. It is not too big a deal. It will cost about £2,000 to repair. The garden will need to be dug up but it can be sorted out in a week. The neighbour has agreed to pay the cost of repair.

They have also now discovered some **dry rot** in and around the staircase. A specialist that they have called in has given them a written report stating that the dry rot would have been active and causing progressive timber decay when the new staircase was put in. He has also said that it would have been obvious at that time to any specialist such as himself carrying out a reasonable investigation.

Time to go?

Mr and Mrs Purdue have had enough. They are annoyed about the missing water feature. They are fed up with the difficulty with the parking, they are fed up with Mr Jones. The business with the garden is really annoying and finding the dry rot around the staircase is the last straw. They consider that they have been misled by Mrs Viktor and they want to rescind the contract to purchase the house.

Questions:

1. Are there any possible grounds upon which Mr and Mrs Purdue can have the contract rescinded? What are they?
2. Do you think the court will order rescission?
3. Will damages be awarded instead of rescission?

To help you come to some conclusions consider these questions:

1. Was there a dispute or complaint relating to “property” between Mr Jones and Mr and Mrs Viktor.
2. Is there any claim in relation to the water feature?
3. Drains: Has the answer “not so far the seller is aware” caused a problem?
4. Has the statement in relation to the parking caused a problem?
5. Will Mrs Viktor's answer in relation to the dry rot protect her?

MISREPRESENTATION ACT 1967

Section 2(1) - Liability

Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, **unless he proves** that he had **reasonable grounds to believe and did believe up to the time of the contract** was made that the facts represented were true.

- No need to establish a duty of care.
- Reverses the burden of proof so that it is on the person making the representation

Section 2(2) - rescission

Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator **may declare the contract subsisting and award damages in lieu of rescission**, if of the opinion that it would be equitable to do so, having regard to the **nature of the misrepresentation** and the **loss that would be caused** by it if the contract were upheld, as well as to the **loss that rescission would cause to the other party**.

Section 3 – exclusion clauses

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) any remedy available to another party to the contract by reason of such a misrepresentation,

the term shall be of no effect except in so far as it satisfied 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 the requirement** to show that it does.

Under **s11(1)** the requirement of reasonableness 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”. There are certain guidelines in Schedule 2 of UCTA.

(Note however that s3 of **UCTA itself** (liability arising in contract) does not apply to contracts for the creation or transfer of interests in land; eg *Electricity Supply Nominees Ltd v IAF Group Ltd* [1993 3 All ER 372; although compare the Unfair Terms in Consumer Contracts Regulations 1999 in the context of residential tenancies; *London Borough of Newham v Khatun* [2004] EWCA Civ 55).

STANDARD CONDITIONS OF SALE (4ED)

7.1 Errors and omissions

7.1.1 If any plan or statement in the contract, or in the negotiations leading to it, is or was misleading or inaccurate due to an error or omission, the remedies available are as follows.

7.1.2 When there is a **material difference** between the description or value of the property ... as represented and as it is, the buyer is entitled to **damages**.

7.1.3 An error or omission only entitles the buyer to **rescind** the contract:

(a) where it results from fraud or recklessness, or

(b) where he would be obliged, to his prejudice, to accept property **differing substantially** (in quantity, quality or tenure) from what the error or omission led him to expect.

- These contractual rights are subject to s2(2)
- However, they are pretty stringent so if the conditions in 7.1.3 are satisfied the buyer has probably gone a long way towards obtaining rescission under s2(2).

“NOT SO FAR AS SELLER IS AWARE”

William Sindall plc v Cambridgeshire County Council [1994] 3 All ER 932

The enquiries before contract asked:

“Is the vendor aware of any rights ... specifically affecting the property, other than any disclosed in the draft contract or immediately apparent on inspection, which are exercisable by virtue of any easement .. or which are in the nature of public ... rights?”

Answer:

“Not so far as the vendor is aware”.

There was in fact a sewer going across the land with the benefit of an easement. The sewer was recorded in documents held by the city planning department but these were not discovered at the time. The site was purchased for development but existence of the sewer made development of the site more problematic. However, the existence of the sewer was a minor matter that could be overcome at a cost of £18,000. Since the sale the market had collapsed so that if the contract was rescinded the council would lose about £6m.

Hoffmann LJ:

“It is well established that a statement that a vendor is not aware of a defect in title carries with it an implied representation that he has taken reasonable steps to ascertain whether any exists. This may require him, in the first instance, to examine his title deeds and other records, inspect the property, and obtain legal advice. If there is anything to put him on inquiry as to the existence of a defect, he may have to pursue the matter further by questioning others, or examining their documents... .. the answer **‘Not so far as the vendor is aware’** represents not merely that the vendor and his solicitor had no actual knowledge of a defect, but also that they have made **such investigations as could reasonably be expected to be made by or under the guidance of a prudent conveyancer.**”

RELY ON YOUR OWN SURVEY

Clinicare Limited v Orchard Homes Developments Limited
[2004] EWHC 1694 (QB)

Facts

L proposed granting to T a lease of commercial premises. In the pre-contract enquiries T asked whether the building had ever suffered from dry rot. L’s solicitor replied:

“The vendor is not aware of any such matters, however we suggest you make and **rely upon your own inspection and survey.**”

T did obtain its own full survey which showed that there was dry rot in the **roof** space and advised T to carry out remedial works. In relation to another area, **the staircase**, T’s surveyor wrote:

“We understand from the landlord that the staircase is new as the previous one suffered from dry rot and had to be replaced. We recommend the extent of the dry rot and the remedial works undertaken be confirmed by the specialist employed by the landlord.”

T failed to do that. Some time after the lease was granted a substantial amount of dry rot was found around the **staircase**. T had to vacate so that works could be carried out to get rid of it. T claimed damages for misrepresentation.

Held:

The written reply to the pre-contract enquiry carried with it an implied representation that L had taken reasonable steps to ascertain whether the property had suffered from dry rot. The representation was clearly false and was not subsequently corrected. T had been **in part induced** by the representation to enter into the lease, notwithstanding that T had obtained its own survey! The judge at para 48:

“I have reached the conclusion that Mr Andrews’ decision to ignore [T’s] surveyor’s advice, in the belief that the dry rot was limited to the northern roof

space was in part induced by [L's] misrepresentation. He believed that [T] was sufficiently protected because he believed that [L] had cured the dry rot in the staircase and had taken reasonable steps to investigate the outbreak of the dry rot. It was those representations, which, in part, induced him to ignore [T's surveyor's advice] and enter into the lease with the side agreement in the belief that there was no other outbreak of dry rot and it was unnecessary to investigate further."

Comment

Some may consider the case to be wrongly decided! But note:

- The importance of being very careful when using the words "not so far as the vendor is aware", even with a further caveat.
- There may be other factors influencing the decision but so long as the misrepresentation was one of them, the claimant will succeed. "In order to found an action for misrepresentation the representation must induce the representee to alter his position for the worse. The representation however, need not be the sole inducing cause" – para 40 citing *Edington v Fitzmaurice* [1885] 29 Ch D 459.

How about this in the contract ...

"In the light of the decision in *William Sindall plc v Cambridgeshire County Council* it is hereby agreed and declared that replies to any enquiries or information supplied in any Property Information Forms are given to the best knowledge, information and belief of the Seller but neither the Seller nor their Solicitors have made any further enquiries into such matters (such as but without limitation to conducting a site inspection and making specific enquiries of statutory utilities) and the replies are therefore given on this basis."

Or simply this in the answers...

"The Seller does not know and has not made any enquiries into such matters".

SELLER'S PROPERTY INFORMATION FORM

McKeekin v Long
[2003] 29 EG 120

The Seller's Property Information Form contained the following two questions under the heading "Disputes":

"Do you know of any disputes about this or any neighbouring property?"

"Have you received any complaints about anything you have or have not done as owners?"

The importance of giving correct answers to these questions is made plain on the form itself:

"It is very important that your answers are correct because the buyer will rely on them in deciding whether to go ahead. Incorrect information given to the buyer through your solicitor, or mentioned to the buyer in conversation between you, may mean that the buyer can claim compensation from you or even refuse to complete the purchase".

In this case, the sellers answered both questions in the negative. They also made a verbal representation that the "neighbours were good and friendly". In fact that there were on-going disputes about parking on the access road, over which the sellers had a right of way on land owned by neighbours, and about rubbish. The buyers claimed damages for misrepresentation. The sellers' defence was that the dispute had been resolved when a jointly instructed solicitor had advised them that the neighbours were right in law in relation to the parking. They also said that although there had been an incident relating to rubbish it did not constitute a dispute. However, the judge held that

"the truth of the matter is that there was an atmosphere of constant confrontation between Mr and Mrs Cooper (who owned the land over which the right of way passed) and the other occupants of the houses on the road. ... The correspondence I was taken to during the evidence .. led me to the clear conclusion that Mrs Long knew that there were disputes about both parking and the dumping of rubbish".

He found that the buyers had established fraudulent misrepresentation.

"The seller's property information form could not be expressed in clearer language. It is not a lawyer's form, but one that is designed for everyone to be able to understand. There could be no confusion or misunderstanding about the questions... Given the background, as I accept it from the evidence, when the defendants came to answer those two questions, it is impossible to conclude other than that they must have known that they were not being truthful when they answered those two questions. So simple are those questions to understand and to answer, and so obvious were the disputes that had and still exist, not just in relation to the defendant's property but to the other properties using the access road, that it is not possible to conclude that, in answering them falsely, that was done merely recklessly or carelessly." (Astill J)

Comment: This case obviously turns up on its own facts but it does highlight how important it is fully and frankly to answer the questions about disputes (and indeed any of the other questions) in the form. It is becoming increasingly common for buyers to sue for fraudulent misrepresentation in these sorts of cases.

ITEMS SEEN BY PURCHASER BEFORE EXCHANGE – MISSING AT COMPLETION – BREACH OF CONTRACT?

Taylor v Hamer

[2002] EWCA Civ 1130; [2003] EG 127

Facts

When the purchaser viewed the property “the dog garden” was covered in flagstones. Prior to exchange the seller removed the flagstones and, in answer to an enquiry, made a false statement about them not being removed from the property. These are the key paragraphs in the judgment relating to the facts:

“4. Over the weekend of 3 to 5 May 1997, about 282 square yards of these flagstones were taken up, on the instructions of the respondent’s husband, and stacked in a field outside the curtilage of the property. On the husband’s instructions, grass was laid in their place. The judge found that the respondent’s husband wished to disguise the fact that the flagstones had been removed.

5. On 21 May 1997, a representative of the appellant’s solicitor visited the property. He saw and photographed the flagstones where they had been freshly stacked. On the following day, 22 May 1997, he raised the following enquiry before contract:

‘With regard to the pile of paving slabs (between Easington Hall and the pond immediately to the west) **have these been taken from the curtilage of the Hall?** If so, has listed building consent been obtained for this?’

6. The response, dated 23 May 1997, was “**No** and they are not included in the sale, but they are to be removed by the vendors.”

7. The judge held that this answer was made fraudulently, in that the respondent’s husband knew that the flagstones had been removed from the dog garden, and gave the answer with the respondent’s authority...”

Decision

The seller was held (by the CA) to be in **breach of contract** (not just in tort for deceit) and was ordered to restore the flagstones to their former location or to indemnify him the cost of so doing. The flagstones were part of “the property” that the seller had agreed to sell to the purchaser. This was despite the fact that the contract contained an entire agreement clause. The seller, having surreptitiously moved the flagstones and subsequently lied about it could not rely upon the entire agreement clause (Arden LJ dissented). Sedley LJ at para 90, 91 and 92:

“.. the meaning to be ascribed to ‘the property’ in the conveyance is the meaning it would be given by a reasonable person who knows what the parties knew at the time they contracted. ..On [the Judge’s] findings, it includes the facts that the claimant had been shown the premises that included the flagged dog garden,

and that he had not been told before contract that this was no longer part of the realty...

This would probably be enough ... to make the flagstones part of “the property” for which the parties went on to exchange contracts. But here, additionally, the vendor deliberately induced the buyer, through his solicitor, to believe that there had been no such alteration.

Against this background, any reasonable person, in my judgment, would have understood the property that was being bid for, ***and contracted for***, to include the flagstones in the dog garden. The case falls outside the *caveat emptor* paradigm ... because the vendor, by his conduct in inviting an offer for the property as shown to the purchaser, and without any explicit subtraction from it, represented that it was to include the flag garden."

Comment

However see the case of *Jones v Taylor-Rose* [2004] EWCA 299 where the judge at first instance said this about *Taylor v Hamer*:

"It does not, in my judgment, mark the sea-change for which Mr Toone contends. It seems to me that the decision in *Taylor v Hamer* depended on the interplay of three relevant considerations. These were the definition of the property to be sold in the contract; a clause in that contract which stated that the purchaser was deemed to have inspected the property; and the giving of any answer regarding fixtures surreptitiously removed by her husband, which the vendor was found to have given fraudulently. The case does not, in my judgment, have any wider significance."

(This quote can be found in the CA decision at para 15. The CA itself however in *Jones* made no specific comment on *Taylor v Hamer*).

ENTIRE AGREEMENT / NON-RELIANCE CLAUSES

Note that neither the Standard Conditions nor the Standard Commercial Property Conditions contain an entire agreement / non-reliance clause. However, there is of course nothing to stop such clauses being made part of the contract which frequently occurs in commercial contexts.

An acknowledgement of non-reliance can operate as an evidential estoppel. In *Lowe v Lombank* [1960] 1 All ER 611 it was held that there are three matters to be satisfied before such a conclusion will be reached:

1. That the clause is clear and unambiguous
2. That it was intended to be acted upon.
3. That the party to whom the statement of non-reliance was made [*ie. the vendor*] believed it to be true and was induced by such belief to act on it.

This third requirement can often make the clause difficult to rely upon especially in a low level transaction such as where a representation is made during the sale of a house.

Watford Electronics Ltd v Sanderson CFL Ltd
[2001] EWCA Civ 317
(Not a property case)

Chadwick LJ:

39. The effect of an acknowledgement of non-reliance ... was considered in this Court in *E A Grimstead & Son Ltd v McGarrigan* (unreported, 27 October 1999). In a passage which was *obiter dicta* – but which followed full argument on the point – I said this (at page 32A-C of the transcript):

"In my view an **acknowledgement of non-reliance** . . . is capable of operating as an **evidential estoppel**. It is apt to prevent the party who has given the acknowledgement from asserting in subsequent litigation against the party to whom it has been given that it is not true. That seems to me to be a proper use of an acknowledgement of this nature, which ... has become a common feature of professionally drawn commercial contracts."

I went on, at page 35A-C, to say this:

"There are, as it seems to me, at least two good reasons why the courts should not refuse to give effect to an acknowledgement of non-reliance in a **commercial contract** between **experienced parties of equal bargaining power** – *a fortiori*, where those parties have the benefit of professional advice. First, it is reasonable to assume that the parties desire commercial certainty. They want to order their affairs on the basis that the bargain between them can be found within the document which they have signed. They want to avoid the uncertainty of litigation based on allegations as to the content of oral discussions at pre-contractual meetings. Second, it is reasonable to assume that the price to be paid reflects the commercial risk which each party – or, more usually, the purchaser – is willing to accept. The risk is determined, in part at least, by the warranties which the vendor is prepared to give. The tighter the warranties, the less the risk and (in principle, at least) the greater the price the vendor will require and which the purchaser will be prepared to pay. It is legitimate, and commercially desirable, that both parties should be able to measure the risk, and agree the price, on the basis of the warranties which have been given and accepted."

40. ... It is true that an acknowledgement of non-reliance does not purport to prevent a party from proving that a representation was made, nor that it was false. What the acknowledgement seeks to do is to prevent the person to whom the representation was made from asserting that he relied upon it. If it is to have that effect, it will be necessary – as I sought to point out in *Grimstead v McGarrigan* – for the party who seeks to set up the acknowledgement as an evidential estoppel to plead and prove that the **three requirements** identified by this Court in *Lowe v Lombank Ltd* [1960] 1 WLR 196 are satisfied. That may present insuperable difficulties; not least because **it may be impossible for a party who has made representations which he intended should be relied upon to satisfy the court that he entered into the contract in the belief that**

a statement by the other party that he had not relied upon those representations was true. But the fact that, on particular facts, the acknowledgement of non-reliance may not achieve its purpose does not lead to the conclusion that the acknowledgement is "in substance an exclusion clause to which section 3 of the Misrepresentation Act is applicable".

In *Morgan v Pooley* [2010] EWHC 2447 the judge dismissed a claim for misrepresentation on the facts. There had been no misrepresentation. However, the seller had also relied upon a non-reliance clause in the special conditions which was in the following terms:

"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."

In relation to that clause the judge said as follows at para 114:

"In my view, there is a difference between two types of situation. The first is where the non-reliance clause is one of many clauses in a long contract prepared by lawyers which the parties to it may have had limited opportunity to read in detail beforehand. In that situation it might well be argued successfully that the party relying on the clause should not be allowed to do so because the clause falls with the contract when it is avoided for misrepresentation. The second type of situation is like the one here. As I have already explained, the Special Conditions were known to Mr and Mrs Morgan, or at least to their solicitors, well before they entered into the contract but probably after they had seen the SPIF. It was a short document and the conditions were printed in large type and were easily readable. This, taken together with the early notice that the sellers were entering into the transaction on the basis of the *William Sindall clause*, leads to the conclusion that in the circumstances of this case the non-reliance clause should be given effect."

However, it is difficult to see how the clause in this case could possibly apply to the situation: the representation (that no notice was served) was in writing, the words "as being representations upon which reliance is placed" don't seem to make much sense as it is the buyer not the vendor who might be relying on the representation; and the representation (that no notice was served) was not capable of independent verification by the buyer. As indicated above in *Watford Electronics Ltd* the Court of Appeal made a different broad distinction, ie. between commercial and residential agreements.

EXCLUSION CLAUSES IN REPLIES TO ENQUIRIES

Walker v Boyle
[1982] 1 All ER 634

The remedy sought was rescission and return of the deposit.

Question asked: "Is the vendor aware of any disputes regarding the boundaries, easements, covenant or other matters relating to the property or its use?"

Answer: "Not to the vendor's knowledge .."

In fact there was a dispute. The answer was given innocently by the seller's husband, who was not aware of the dispute, on behalf of the wife.

The vendor sought to rely upon condition 17(1)(a) of the National Conditions of Sale (19ed) which said: "no error, misstatement or omission in any preliminary answer concerning the property ... shall annul the sale nor (save where the error, misstatement or omission is in a written answer and relates to a matter materially affecting the description or value of the property) shall any damages be payable, or compensation allowed by either party, in respect thereof".

The court held that this was an unfair contract term that did not assist the vendor. The fact that it was contained in standard conditions did not prevent it being unfair.

As stated above the relevant clauses are now 7.1.2 and 7.1.3 of the Standard Conditions. These are much less likely to be found to be unfair. However, if on the facts in any particular case 7.1 is found to be unfair the effect of *Walker v Boyle* is that the mere fact that they are contained in the Standard Conditions will not make them fair.

In *Morgan v Pooley* [2010] EWHC 2447 the judge found that there had been no misrepresentation. However, another one of the vendor's arguments in the case was that even if there was a misrepresentation the purchaser could not rely upon it because of a non-reliance clause. The purchaser in turn said that the non-reliance clause fell foul of the test of reasonableness in s3 of the 1967 the judge said this at para 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 [the purchasers], 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 [the vendors] 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."

He went on to distinguish *Walker v Boyle* which he said was decided on its own facts. However, it is noticeable that the judge did not work his way through the various factors in the Unfair Terms Contract Act that are relevant and are incorporated into s3 of the 1967 Act.

(When dealing with entire agreement clauses consider all the following cases: *Peekay Intermark Ltd* [2006] EWCA Civ 386 paras 56 and 57; *Springwell v JP Morgan Chase Bank* [2010] EWCA Civ 1221, paras 141 to 171; *AXA Sun Life Services PLC v Campbell Martin Ltd* [2011] EWCA Civ 133, paras 34-36)

RESCISSION OR DAMAGES IN LIEU

We have seen that the standard conditions contain a term relating to rescission. It is in the following terms:

"An error or omission only entitles the buyer to rescind the contract:

- (a) where it results from fraud or recklessness, or
- (b) where he would be obliged, to his prejudice, to accept property differing substantially (in quantity, quality or tenure) from what the error or omission led him to expect."

The fact that the misrepresentation has become part of the contract or that the contract has been performed does not take away the right to rescind (s1 of the Misrepresentation Act 1967)

However, although the contract may allow rescission, this will be subject to s2(2) and (3) of the 1967 Act which allows the court to make an order upholding the contract and to award damages in lieu of rescission:

(2) Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator **may declare the contract subsisting and award damages in lieu of rescission**, if of the opinion that it would be equitable to do so, having regard to the **nature of the misrepresentation** and the **loss that would be caused** by it if the contract were upheld, as well as to the **loss that rescission would cause to the other party**.

(3) Damages may be awarded against a person under subsection (2) of this section whether or not he is liable to damages under subsection (1) thereof, but where he is so liable any award under the said subsection (2) shall be taken into account in assessing his liability under the said subsection (1).

It can be seen from the highlighted parts that when deciding whether or not to it is equitable to exercise the power to uphold the contract the court will have regard to the nature of the misrepresentation and balance the loss that will be caused to the buyer if the contract is upheld against the loss caused to the seller if the contract is rescinded.

The court's ability to make an order upholding the contract and awarding damages in lieu is demonstrated in the case referred to above, *William Sindall plc v Cambridgeshire County Council* [1993] EWCA Civ 14. It will be recalled that the council vendors had used the phrase "not so far as the seller is aware" in relation to a question about drains across the land being sold. In fact there were drains present and the Council had not made reasonable enquiries into the matter. There was therefore a misrepresentation that gave rise to liability. However, the existence of the sewer was a minor matter that could be overcome at a cost of £18,000. Since the sale the market had collapsed. Basically, the buyer (the property developer) wanted to get out of the purchase because of the decline in market conditions. If it was allowed to rescind the contract the council would lose about £6m. In fact the right to rescind had been lost but if it had not been, weighing up the factors specified in s2(2) the Court of Appeal held that it would not have been just to rescind the contract. Hoffman LJ:

"If one looks at the matter when Sindall purported to rescind, the loss which would be caused if the contract were upheld was relatively small: the £18,000 it would have cost to divert the sewer, the loss of a plot and interest charges on any consequent delay at the rate of £2,000 a day. If one looks at the matter at the date of trial, the loss would have been nil because the sewer had been diverted.

The third matter to be taken into account under Section 2(2) is the loss which would be caused to Cambridgeshire by rescission. This is the loss of the bargain at the top of the market ... having to return about £8 million in purchase price and interest in exchange for land worth less than £2 million.

Having regard to these matters, and in particular the gross disparity between the loss which would be caused to Sindall by the misrepresentation and the loss which would be caused to Cambridgeshire by rescission, I would have exercised my discretion to award damages in lieu of rescission."

In the course of the judgment the following comments were also made:

"The discretion conferred by s2(2) [of the 1967 Act] is a broad one, to do what is equitable. But there are three matters to which the court must in particular have regard...

Damages under s2(2) are .. damages for the misrepresentation as such. What would be the measure of such damages?...

In my view, s2(1) is concerned with the damage flowing **from having entered into the contract**, while s2(2) is concerned with damage caused by the property **not being what it was represented to be**.

In a residential situation is it likely that the court will ever order rescission?