



LEGAL BRIEFING

Hunt and others v (1) Optima (Cambridge) Ltd and (2) Strutt and Parker (a Firm)

[2014] EWCA Civ 714, Lord Justice Maurice Kay, Lord Justice Tomlinson and Lord Justice Christopher Clarke

The Facts

During 2002 – 2003 Optima (Cambridge) Ltd (“Optima”) constructed two blocks of flats in Peterborough. Optima employed Strutt & Parker (“S&P”) to carry out inspections of the on-going works and to provide “Certificates” attesting to the satisfactory construction of the completed flats for the benefit of purchasers and lenders.

The claimants were all owners of the flats who commenced proceedings against Optima and S&P following the appearance of serious defects during 2005. The claimants had all been told that they would be receiving S&P’s Certificates upon completion but only two of the claimants received a Certificate in advance of the date of purchase of their flat.

At first instance, in the Technology & Construction Court, Mr Justice Akenhead found in favour of the claimants on three grounds:

(i) that having issued Certificates that erroneously attested to the satisfactory construction of the flats, S&P had made negligent misstatements in line with the authorities commencing with *Hedley Byrne & Co Ltd v Heller & Co Ltd* [1964] AC 465;

(ii) that S&P were in breach of a dual duty of care in connection with their role in the project i.e. firstly to take care in carrying out the work of inspection that led to the Certificates and secondly to take care in compiling the Certificates; and

(iii) that S&P’s Certificates amounted to a form of collateral warranty in favour of the claimants.

S&P appealed, save in relation to judgment in favour of the claimants who had received the Certificate in advance of the date of purchase of their flat.

The Issues

The Court of Appeal had to decide:

(i) whether S&P’s Certificates constituted negligent misstatements;

(ii) whether S&P owed a duty of care to the claimants and, if so, the nature of that duty; and,

(iii) whether the certificates amounted to enforceable contractual warranties.

The Decision

In reversing the first instance decision, the Court of Appeal found that the Certificates could not constitute negligent misstatements. In order to recover against S&P the claimants needed to show that they had relied upon the negligent statements in the Certificates. However, the claimants could not have relied on such statements when committing to purchase the flats because the Certificates were only provided to them after purchase of the properties – in some cases years later.

On the second issue the Court of Appeal found that any liability arising from the certificates should be governed by the law relating to negligent statements. This was where the Certificate was designed to operate as a statement upon which purchasers would rely in entering into their sale contracts and mortgages. In this case, that is not what happened. S&P owed Optima a contractual duty in respect of inspection but that did not mean that S&P owed future holders of the Certificate a similar tortious duty of inspection that was independent of any reliance placed on the Certificate for the purposes of purchase.

Finally, the Court of Appeal found that read as a whole the Certificates did not constitute contractual warranties, observing that the Certificates were described as such (i.e. as "certificates") and not as a promise, warranty or guarantee. The Certificates also contained language such as "*I am aware that this Certificate is being relied upon...*", which was typical of a document intended to be relied upon, which would thus give rise to a potential liability in negligent misstatement. Lord Justice Christopher Clarke concluded, "*.....in my judgement the phraseology of the Certificate, taken as a whole, does not amount to a warranty. If that had been intended it would have been very easy to say so...*".

Commentary

Where Optima had entered administration, Lord Justice Christopher Clarke appears to have been troubled by the overall result which deprived the claimants of a remedy against S&P. Given that one of the principal objectives of the Certificates was to provide reassurance to potential purchasers, he noted the potential injustice that could be said to arise if S&P could escape liability by reason of the fact that the Certificates were all provided after the date of purchase and in some instances not created until after the date of purchase.

The Judgement does not give any indication of why having been promised Certificates, each claimant went ahead and completed their purchase without sight of the only direct assurance as to build quality on offer.

Lyndon Smith
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