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Thomas Heintzman specializes in arbitration and mediation relating to corporate disputes, shareholder's rights, securities law, broadcasting/telecommunications and class actions, construction and environmental law.

He has been counsel in many important actions, arbitrations, and appeals before all levels of courts in many Canadian provinces and has made numerous appearances before the Supreme Court of Canada.

Thomas Heintzman is the author of *Heintzman & Goldsmith on Canadian Building Contracts, 4th Edition* which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Can Silence Amount To A Fraudulent Misrepresentation?

The Ontario Court of Appeal recently dealt with the issue of what sort of representations amount to fraud, and what representations survive an "entire agreements" clause. In ***Iatomasi v. Conciatori***, the Court of Appeal held that when, during the pre-contractual negotiations for the sale of a building, a vendor delivers plans to a purchaser, there is no implied representation that the building was built according to the plans. The court held, however, that the vendor is liable in fraudulent misrepresentation for statements that there had never been problems with the basement of the house, notwithstanding the "entire agreements" clause. The court awarded damages.

Factual Background

During the negotiations for the purchase of a home, the vendor represented to the purchasers that there had never been a problem with respect to water leaking in the basement. The trial judge found that the vendor knew that there had been a history of water problems in the basement. During the negotiations, the owner gave the purchasers the plans for the house. The trial judge found that, in doing so, the vendor effectively represented that the building had been built in accordance with those drawings, and that this representation was untrue. The contract of purchase and sale of the home contained a provision stating that the contract was the entire agreement between the parties.

Decision of the Court of Appeal

The Court of Appeal held that the vendor was liable to the purchasers for fraudulent misrepresentation arising from the first express statement, but not for the second implied representation and reversed the trial judge's decision on the second point.

As to the first representation, that there were no basement water problems, the Court of Appeal made no mention of the "entire agreement" clause. The court appears to assume that the clause would not apply to representations, or if it did, it would not apply to fraudulent misrepresentations.

As to the second representation, that the handing over of the plans effectively amounted an implied representation that the house was built in accordance with those plans, the Court of Appeal held that since the plans were provided to the purchaser in the "context of arm's length negotiations", a finding that this conduct amounted to an "implied representation as to the accuracy of those plans was unreasonable." Again, no mention was made by the court of the entire agreement clause in the part of its decision dealing with this issue.

Based on the first express misrepresentation, the Court of Appeal held the vendor liable for fraudulent misrepresentation.

The Court of Appeal upheld the approach to the award of damages adopted by the trial judge. The trial judge concluded that the purchasers' damages were the difference between the price paid for the property and the actual value of the property at the time of the sale, and that that difference was equal to the cost of remedying the problems relating to the misrepresentations. Or, as the Court of Appeal said, "the difference between the actual value of a house with a leaking basement and the price paid was equal to the costs of the repairs needed to fix the existing leakage-related problems."

Having found that the vendor was liable only for the express representation regarding the non-leaky basement, not the implied representation about the compliance with the plans, the Court of Appeal discounted the damages to award only the costs associated with repairing the first problem.

Comments

The most interesting aspect of this decision is the conclusion by the Court of Appeal that the handing over of plans does not amount to an implied representation that the building was built

in accordance with those plans. The decision will likely be relied upon in the future for the proposition that silence does not amount to fraud, and that when something like plans or specifications are delivered during the negotiation of a contract, that conduct does not amount to a representation, or at least not a fraudulent representation.

There could, however, be a number of bases for this conclusion. One basis could be the “entire agreements” clause, even though it was not mentioned in the court’s decision on this point. If this is so, then the Court of Appeal’s decision is only applicable if the contract in issue has an “entire agreements” clause.

If it was the “entire agreements” clause which led to this result, then the question is: Why? Would the clause apply because the implied representation was really a warranty –that is, an agreement - that the plans had been used to build the house, and the “entire agreements” clause eliminated the effect of such an agreement?

Or did the “entire agreements” clause apply to the implied statement as a representation, not an agreement. If this is the case, then the further question would be: does the clause apply to innocent, negligent, or any (including fraudulent) misrepresentations? This question is not answered by the Court of Appeal’s decision since the “entire agreement” clause was not part of its reasoning.

Another basis for the court’s decision may be that the delivery of plans during the negotiations for the purchase and sale of a property cannot, without more, amount in law to an implied representation that the plans were used to build the building. Indeed, the Court of Appeal said that the trial judge’s conclusion that the handing over of the plans did amount to such a representation was “unreasonable.” If this is so, then this decision opens up a wide scope for the delivery of all sorts of relevant materials during the negotiation of a contract without responsibility for the accuracy of those materials. If the Court of Appeal’s decision is strictly applied, then parties to the negotiation of a building contract must obtain specific representations about the accuracy and the past use of those materials.

This decision will also be relied upon by those asserting that entire agreement clauses can never apply to fraudulent misrepresentations, at least in Ontario. While that seems to be the necessary result of the decision, there is no reasoning in the decision to that effect and the issue may have to be addressed in subsequent decisions. It seems intuitively obvious that an entire agreements clause cannot apply to fraud. But whether such a representation is a collateral warranty which must be treated as such and subject to the “entire agreements” clause, or is simply outside that clause on the grounds of fraud, is not entirely clear in law.

See Heintzman and Goldsmith, *Canadian Building Contracts* (4th ed.), Chapter 6 Part 4(b)(i) and Chapter 6 Part 2(b)(i)(c) and (ii)(c)

***Iatomasi v. Conciatori*, 2012 ONCA 913**

Construction Law - Fraudulent Misrepresentation - Exclusion and Limitation Clauses

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