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## Buyer Beware: Court of Appeal ruling reinforces purchaser responsibility in seismic report dispute

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The Court of Appeal has recently overturned a decision of the High Court concerning the extent to which a purchaser can rely on representations regarding the NBS rating of a commercial building contained in an Initial Seismic Assessment, in circumstances where those representations turn out to be incorrect. While the High Court found that the representations in that case amounted to a misrepresentation under section 35 of the Contract and Commercial Act 2017, the Court of Appeal disagreed with that decision, restoring the principle of buyer beware in relation to seismic matters in sale and purchase transactions.

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1. In 2023, the High Court heard a case concerning a dispute over the extent to which a purchaser can rely on an expert third party report supplied by a vendor in relation to the property for sale (*Tadd Management v Weine*). In this case, the report provided was an initial seismic assessment (*ISA*) of a commercial building, which stated the NBS rating for the building was 60 percent. Following settlement, the purchaser obtained two detailed seismic assessments (*DSA*) for the building which assessed the NBS for the building as 30 percent and 10 percent, respectively. The purchaser sued the vendor for its losses (being its costs incurred in seismically strengthening the building), claiming it was induced to enter into the transaction as a result of contractual misrepresentation or, in the alternative, common mistake, as to the NBS for the building.
2. The High Court sided with the purchaser, stating that the *ISA* (together with covering letter and marketing information in relation to the *ISA*) provided were representations as to fact (not opinion), were incorrect, and were relied upon by the vendor, thereby meeting the threshold for misrepresentation under section 35 of the Contract and Commercial Law Act 2017 (*Act*). The High Court also held, for similar reasons, that the grounds for common mistake under the *Act* were also made out.
3. The case highlighted the risk to vendors in supplying information to prospective purchasers in relation to the seismic performance of buildings, and in particular, initial or desktop assessments. It also undermined, in relation to *ISAs* (and despite the cautionary wording in the *ISA* itself suggesting that the assessment might not be accurate), the principle of “buyer beware” and purchaser due diligence.
4. In a recent decision, the Court of Appeal has overturned the High Court’s decision in *Tadd*. The Court of Appeal agreed that *ISAs*, as expert reports, are, by their nature, not merely expressions of opinion, but rather will contain statements of fact. The Court of Appeal disagreed that the representations in the *ISA* in this case amounted to misrepresentation, because:
  1. the relevant statement of fact in the *ISA* was not that the building had an NBS rating of 60 percent but that the author of the report had assessed the building’s NBS rating to be 60 percent by applying the correct methodology in an honest and reasonable

- way; and
2. therefore, the different NBS ratings in the subsequent DSAs did not mean that the representations in ISA amounted to a misrepresentation of fact.
  5. therefore, the different NBS ratings in the subsequent DSAs did not mean that the representations in ISA amounted to a misrepresentation of fact.
  6. The Court of Appeal drew comparisons between ISAs which have been honestly and reasonably prepared using the correct methodology (but the findings of which turn out not be entirely correct) with valuation reports or legal opinions - also honestly and reasonably prepared but which have anticipated outcomes that are not ultimately borne out. Provided the report/opinion is prepared with the proper skill, care and diligence that would normally be expected of a competent professional), the representations made within them cannot amount to misrepresentations or mistakes.
  7. The Court of Appeal's decision reinstates the principle of buyer beware in relation to ISAs, thereby smoothing over the contractual uncertainty created by the High Court decision. While the outcome in Tadd may seem severe on the purchaser (who ultimately has paid a purchase price which did not reflect the building's true value having regard to the actual NBS), and given the barriers (both time and cost) to the obtaining this type of information in a competitive sale or tender process, it may be that the market now responds in a way to afford protections to purchasers against this sort of outcome in the future: vendors may now have no choice but to provide detailed seismic assessments of buildings to prospective purchasers, in order to avoid material discounts to the purchase price on account of the uncertainty to purchasers arising from initial or desktop assessments.
  8. Against the Court of Appeal's decision, vendors (and their agents) should continue to be cautious in the provision of ISAs and DSAs, including by:
    1. avoiding making subjective representations about, or drawing conclusions from, the information in such assessments; and
    2. including provisions in sale contracts which prevent a purchaser from relying on the information in any expert reports provided.

If you would like to know more about this case or require advice in connection with the sale of a commercial building, please contact Kelly Johnson or Mark Anderson from our property and real estate team.

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