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## Sellers beware!

Buyers could rescind a contract where a seller has made innocent misrepresentations

In the recent case of *Cleaver and another v Schyde Investments Ltd* [2011] EWCA Civ 929 the Court of Appeal has held that a buyer was entitled to return of their deposit and pull out of a contract to purchase a site that had potential for development as a block of flats.

The seller had answered the usual pre-contract enquiries raised by the buyer. However, the seller failed to update its replies when it became aware of a third party's planning application for a medical centre which might be preferred by the local community, despite knowing that this would be an important consideration for the buyer, and could seriously affect the buyer's development proposals. The buyer only became aware of the planning application following exchange of contracts and refused to complete the contract.

The buyer commenced proceedings for the return of its deposit but the seller counterclaimed for specific performance. The seller argued that the buyer was not able to rescind the contract under condition 7.1.3 of the Standard Conditions of Sale (Fourth Edition) (SCS) as a buyer was only entitled to do so where the error or omission resulted from fraud or recklessness or where the buyer would be obliged to accept property differing substantially from what the error or omission had led the buyer to expect.

In the first instance the county court judge decided that the buyer was entitled to the deposit back as condition 7.1.3 of the SCS was not fair and reasonable in the circumstances of the case having failed to satisfy the requirements of section 3 of the Misrepresentation Act 1967 and section 11 of Unfair Contract Terms Act 1977.

The seller appealed but the Court of Appeal decided that it could only interfere with the county court's decision if it was based on some erroneous principle or was plainly and obviously wrong which they found it was not. The Court of Appeal therefore dismissed the appeal and held that the buyer was entitled to rescind.

When using standard forms of pre-contract enquiries and especially the Commercial Property Standard Enquiries (CPSEs), there is a continuing requirement for the seller to notify the buyer as soon as they become aware of anything which may cause any reply that was given to the CPSEs or any supplemental pre-contract enquiries to be incorrect pending exchange of contracts or, where there is no prior contract, pending completion of the transaction. If the seller fails to do so, it might not be able to rely on the protection of condition 7.1.3 of the SCS (or the similarly worded condition 9.1.3 of the Standard Commercial Property Conditions of Sale (Second Edition)) in the case of innocent misrepresentation where the facts are similar to the facts in this case.

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