

## Room without a view?

It is very common for commercial contracts to include clauses to the effect that the document, as executed by the parties, is their 'entire agreement'. Entire agreement clauses generally provide that the express terms of the contract supersede any prior agreements or representations the contracting parties might have made in regard to the subject of the contract prior to execution of the contract. The intention behind such a clause is to preclude one party from asserting that the other party promised them more than what is expressly written into the contract.

Such clauses cannot exclude fraud because of the principle of law that nobody can contract out of liability for his own intentional wrongdoing. Further, under section 4 of the Contractual Remedies Act 1979, such entire agreement clauses cannot prevent the Courts from enquiring into whether a statement made during negotiations constitutes a representation or a term of the contract or whether it has been relied upon by a contracting party. However the recent High Court case of *Mayoral Drive Trustee Company LTD v Mc Quire & Anor as Trustees of the Swainston Family Trust* illustrates that if the Court considers the clause to be fair and reasonable in the circumstances of the case it will be binding on the parties.

In the *Mayoral Drive* case, Swainston Family Trust agreed to purchase from Mayoral Drive Trustee Company Ltd ("MDTC") an apartment ("Unit 3") on the 3<sup>rd</sup> floor of a proposed development in Queen Street, Auckland. The promotional brochure prepared by MDTC appeared to show Unit 3 with an unobstructed view across a tree-lined Mayoral Drive. However the elevation plan attached to the agreement for sale and purchase indicated that the roofline of the retail component of the development would partially obstruct the view from Unit 3. The agreement contained an 'entire agreement' provision which, among other things, purported to preclude the parties from relying on "any negotiations or discussions prior to the execution of the Agreement" and "anything contained in any brochure".

When the development was completed, the view from Unit 3 was obstructed by the roofline of the retail complex as indicated in the elevation plan. The Swainston trustees refused to complete the purchase asserting that the unobstructed view depicted in the brochure constituted a serious misrepresentation justifying cancellation of the agreement. MDTC sought a Court order to compel the Swainston trustees to complete the purchase of Unit 3.

In deciding the matter the Court had regard to all the circumstances of the case and noted that the Swainston trustees had at all times during the negotiations been represented by a solicitor who was in fact also a trustee of the Swainston Family Trust. The Court also held that the elevation plan attached to the agreement had clearly disclosed that Unit 3 would look on to the roofline of the retail complex. The Court held that the Swainston trustees had not produced any evidence to establish that the unit as constructed was less valuable than the unit as depicted in the agreement and consequently there was no evidence that the Trust would suffer any loss.

Consequently the Court ruled that the provisions in the agreement excluding reliance on representations made during negotiations were conclusive between the parties and ordered the Swainston trustees to complete the purchase of Unit 3 and pay interest for late settlement at the rate specified in the agreement (22% p.a.).

The case is a salient reminder to all parties negotiating commercial contracts to be sure that any material representations made in negotiations are expressly addressed in the final contract.

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