

Harsten Developments v Bleaken: property seller ordered to buy property back following misrepresentation

Russell-Cooke have written in various publications about the area of law called 'misrepresentation' in property transactions. It is an important area of law but one where we do not encounter many reported cases. *Harsten v Bleaken* is such a case.

Broadly, a property misrepresentation occurs where:

1. A seller of property makes a statement of fact about the property in pre-contract discussions,
2. That statement is untrue, and
3. The statement is relied upon by the buyer and causes loss.

The remedies available to a buyer are damages and/or an order to restore the buyer to their original position, usually by way of a re-sale of the property back to the seller (known as rescission). However, rescission is more rarely ordered because damages will usually be an adequate remedy. Unless the misrepresentation was fraudulent (made knowingly or recklessly as to its truth) the misrepresentation must be a serious one in order for rescission to be available. The right to rescission can also be lost by the buyer opting to treat the contract as continuing after becoming aware of the misrepresentation or delay in bringing a claim. Frequently, the sale contract will contain limitations on the seller's liability.

In *Harsten v Bleaken* a developer bought a site at auction with a view to building a detached house on the land. In the auction particulars, the sellers made several statements which the court decided were misrepresentations including the extent of the property being transferred and the existence of a drainage pipe under the land which made it practically impossible to build a house on the land.

The court ordered the sellers to buy the property back from the developer and pay damages as well for other losses, although not all of the developer's alleged losses were recoverable. The decision will have been devastating for the sellers: they were ordered to refund the purchase price with interest and costs despite the market having fallen substantially in the interim. They will have to refund the buyer all of its conveyancing costs and stamp duty and pay further stamp duty on buying the property back. Although it is not clear from the judgment, they presumably will have had to contribute to the developer's legal costs which may have been substantial.

This case is another reminder to sellers of property to take great care in answering pre-contract enquiries. This applies equally to auction sales as it does to normal conveyancing transactions. Sellers should give complete and honest answers to questions and where they do not know the answer they should say so, or simply not answer the question. Answers such as "not as far as the seller is aware" are frequently given but may imply that the seller

has made reasonable enquiries. If no representation is made at all about a particular issue, the maxim 'buyer beware' applies and the risk ought to lie with the buyer. Equally, buyers should study auction packs closely and make further enquiries if necessary – before the hammer goes down.

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