



VOISIN LAW

Royal Court judgment confirms that property contract *tout tel* clause would not automatically protect vendors from claims for contractual misrepresentation | 1

In the **Mackie v Scott** court judgment on 14 June 2018 the Deputy Bailiff, Timothy Le Cocq QC, confirmed that the standard *tout tel* clause in a conveyance would not exclude claims for contractual misrepresentation where a vendor has made a false representation (whether innocently or not) which a purchaser has relied.

The *tout tel* clause is a standard conveyancing provision including in all Jersey real estate contracts. The clause states as follows:-

"The property was sold with all such rights, appurtenances and dependencies as may attach thereto, in the state in which it was at the date of sale with all its apparent or hidden defects (vices caches)..."

The effect of the clause is that, save as agreed otherwise between the parties, the purchaser takes the property in the condition in which it is found, with all apparent or hidden defects, at the time of passing contract.

In modern practise this means that the purchaser and their lawyers carry out various investigations to ensure that the vendor has good title to the property and the property is in good condition. However part of these investigations include the vendor's responses to pre-contractual enquiries made by the purchaser's lawyers because not all information regarding the property is in the public domain or can be ascertained by a physical inspection of the property.

The **Mackie v Scott** case concerned a claim by the Plaintiff purchaser of damages of approximately 1.5 million from the Defendant vendor regarding false representations made by the vendor about the condition of the property in response to the pre-contractual enquiries.

The Defendant vendor's lawyer argued that the effect of the *tout tel* clause extended to excluding liability for any representation other than deliberate misrepresentation. However the Plaintiff purchaser's lawyer argued that the language of the *tout tel* clause does not have the reach to exclude a claim for pre-contractual misrepresentation.

The judgment was in relation to the preliminary hearing regarding the scope and effect of the *tout tel* clause. The Deputy Bailiff held in favour of the Plaintiff purchaser disallowing the Defendant vendor's preliminary issue application advising that to agree with the Defendant's case would render much if not all pre-contractual enquiries nugatory and would allow the vendor to be reckless in what they tell the purchaser without fear of legal consequences.

In his judgment the Deputy Bailiff states *"the tout tel clause, in its current form, covers all defects whether apparent or hidden, patent or latent, and if the vendor makes no positive representation about such defects, then in my judgment the tout tel clause is determinative of any question. Once there is misrepresentation, however, even if it is covering the same subject matter that would otherwise, absent of representation, be covered by the tout tel clause then that representation stands alone and may in principle be actionable."*

Following the judgment, the case for damages will now continue as to whether the claims by the Plaintiff purchaser of misrepresentation are well made.



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The judgment is a significant development in Jersey Property Law and conveyancing and provides clarity and certainty for both purchasers and vendors.

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