The Court of Appeal has overturned the controversial TCC decision in Hunt and others v Optima (Cambridge) Ltd and others relating to the architects’ duty of care in providing certificates.

In a decision welcomed by architects, the Court of Appeal has overturned the Technology and Construction Court (“TCC”) decision in Hunt and others v Optima (Cambridge) Ltd and others. It has held that an action for negligent misstatement in respect of a number of architects’ certificates failed as the purchasers were unable to show reliance on the certificates, since the certificates had only been provided after the purchasers had committed to the purchases.

Background

Optima (Cambridge) Ltd (“Optima”) had built two blocks of flats and engaged Strutt & Parker (“S&P”) to produce architects’ certificates attesting to the satisfactory construction of the flats. However, the building works were defective and the purchasers in whose favour the certificates were provided sought to bring contractual claims against Optima and also tortious and contractual claims against S&P for the incorrect content of the certificates.

The TCC found in favour of the claimant purchasers in their claims against S&P. S&P appealed on the basis that the certificates had not been provided to the purchasers until after they had committed themselves to the purchase and therefore that the purchasers could not have relied upon the certificates, which is a prerequisite to a finding of negligent misstatement. (Notably, S&P did not seek leave to appeal against the two purchasers to whom a certificate had been provided before the sale agreement was signed.) S&P also appealed against the decision that the certificates could be seen as akin to collateral warranties, thus creating a contractual link between the purchasers and S&P.

“…reliance must follow representation and cannot be retrospective. If the representation is the signed Certificate it cannot be relied on before it comes into existence.”
The Court of Appeal decision

Negligent Misstatement

The Court of Appeal overturned the TCC’s finding of negligent misstatement. Whilst the TCC recognised that reliance was key to the finding, the TCC based this finding of reliance on the fact “that [the purchasers] did rely on the certificates or at the very least on the fact that the certificates would be coming sooner or later….”. However, the Court of Appeal decided that there was no reliance. Any understanding by the purchasers that the certificates were already in place by exchange could not be gained from representations of S&P. Further, any understanding that a certificate would be given on or after completion came from what the purchasers were told by their own professional advisors, and not by S&P, and therefore could not be relied upon against S&P.

Were the certificates equivalent to collateral warranties?

The TCC had also found that the certificates themselves could be construed as collateral warranties, and therefore, that the purchasers’ argument could have succeeded on a contractual basis. However, the Court of Appeal also overturned this finding. The certificates were negotiated by professionals in the industry (the purchasers being legally represented) to whom the difference between a warranty and a representation would have been well known. In addition, whilst Lord Justice Christopher Clarke recognised that the certificates should be looked at as “viewed by a reasonable person with such knowledge as he could be expected to have”; this did not mean they had to be viewed through the eyes of a lay person. As most purchasers are legally represented, they could be considered in light of someone who would recognise the distinction between a certificate and a warranty.

Significance

The Court of Appeal judgment is welcome news for architects and other professionals since it confirms that for a negligent misstatement claim to succeed, the claimant must be able to prove reliance.

However, Lord Justice Christopher Clarke considered that the claims may have succeeded had they been phrased in different terms (e.g. as a claim based on reliance on the terms of a draft certificate that had been issued). In addition, the key to this finding was the lack of reliance given that the purchasers were already committed by the time the certificates were provided. Architects should therefore remain cautious when providing certificates to

“...the phraseology of the Certificate, taken as a whole, does not amount to a warranty. If that had been intended it would have been very easy to say so.”

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purchasers or tenants prior to their committing to a purchase or lease, since any negligent misstatement in the certificates could be grounds for a successful claim if reliance is established.

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