

JERSEY / JUDGMENT

Mackie v Scott [2018]

JRC 102A (14 June 2018)

[2018] JRC 102A

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judgment

the deputy bailiff: 1. By contract passed before the Royal Court of Jersey on 17 th January, 2014, ("the Contract"), Linda Susan Mackie ("the Plaintiff") purchased a property known as St Christopher's from Samantha Jane Scott ("the Defendant"). 2. The Contract contained a standard provision known informally as "the tout tel" clause. This name is based on the French expression of the clause before conveyancing was conducted in the English language. The tout tel clause in the Contract reads 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 cachés), if any, situated in the parish of St Peter, in the Vingtaine of St Nicolas." 3. Both the Plaintiff and the Defendant appeared through attorneys to pass the Contract who each took the customary oath before the Court. 4. By Order of Justice dated 21 st June, 2017, the Plaintiff commenced proceedings against the Defendant claiming damages based on misrepresentation. The Defendant, whilst disputing the allegations of the Plaintiff as to misrepresentation, argues, in any event, that the Plaintiff's claim must fail because any representations made do not withstand the passing of the Contract containing as it does the tout tel clause. 5. For the reasons set out in his judgment of 26 th October, 2017, (Mackie v Scott

[2017] JRC 179) the Master certified the hearing of a preliminary issue in the following terms:-

"Whether or not the alleged liability of the Defendant for the claims advanced by the Plaintiff in her Order of Justice, dated 22 nd June, 2017, are excluded by operation of the tout tel clause in the contract of sale passed before the Royal Court of Jersey of 17 th January, 2014." 6. It is that preliminary issue which has been argued before me and it is the meaning and therefore ambit of the tout tel clause that falls to be determined. 7. Prior to the passing of the Contract there was, as is invariably the case, an exchange of correspondence between the conveyancers acting for the Plaintiff and the Defendant. Within the correspondence a number of queries were raised on behalf of the Plaintiff and confirmations sought. In the responses the Defendant, through her legal advisers, made a number of confirmations which, so the Plaintiff alleges, were false and give rise to her claim in damages. There is no allegation that any representations or confirmations given by the Defendant were deliberately false but merely they were representations that were

wrong in fact. 8. It is not necessary to deal with all of the alleged misrepresentations. An example or two will suffice. In a communication of 6 th January, 2014, marked " Subject to Contract " by the Defendant's legal advisers answers were provided, by interlineation in the Plaintiff's legal adviser's email, with regard to, by way of example, the following matters:- "12.3 - "3.4 Please confirm that whether or not (sic) the property has ever been affected by ... structural defects, defective drains or problems with the drains, damp penetration... or any other defect. OUR CLIENT SO CONFIRMS " 12.4 - "3.6 Please confirm that no ... substance known or suspected to be unsuitable for its purpose, unstable or hazardous, has been used in the present structures forming part of the property ... OUR CLIENT SO CONFIRMS " 12.5 - "3.7 Please confirm that all warranties, guaranties, permissions, permits and/or approvals ... will be provided to and if necessary assigned to our clients (sic) on completion. OUR CLIENT SO CONFIRMS . Please provide full details thereof. ALL DETAILS WILL BE LEFT AT THE PROPERTY ." 9. It is the Plaintiff's case that the interlineation amounted to positive representations that were material and induced the Plaintiff to enter into the Contract. Furthermore, it is the Plaintiff's case that each of the representations of fact were false. 10. It can be readily seen that, in determining the ambit of the tout tel clause, and specifically whether its existence defeats any claims made by the Plaintiff arising out of representations, this matter directly bears upon the effect of any pre-contractual enquiries of the sort typically made in conveyancing in Jersey. Principles of interpretation 11. The principles to be applied in interpreting the clause are largely agreed between the Plaintiff and the Defendant. These have been usefully re-stated in the recent judgment of the Parish of St Helier -v- Minister for Infrastructure

[2017] JCA 027 at paragraph 12 in which the Court of Appeal said:- "The Royal Court set out extensively the principles applicable to the construction of documents, primarily by reference to the decisions of this Court in Trilogy Management -v- Y T Charitable Foundation (International) Limited

[2012] JCA 152 and La Petite Croatie Limited -v- Ledo

[2009] JCA 221 . Those principles, which are well known, may be stated as follows:- 1. The aim is to establish the presumed intention of the makers of the document from the words used; 2. The words must be constructed against the background of the surrounding circumstances or matrix of facts existing at the time of execution of the document; 3. The circumstances relevant and admissible for this purpose are those that must be taken to have been known to the makers of all parties to the document at the time, and include anything which would have affected the way in which the language of the document would have been understood by a reasonable man; 4. Evidence of subjective intention, drafts, negotiations and other matters extrinsic to the document in question is inadmissible as an aide to construction, but may be admitted to resolve a latent ambiguity (that is to say an ambiguity that only becomes apparent when otherwise clear words are related to the surrounding circumstances); 5. Evidence of events subsequent to the making of the document is inadmissible as an aid to construing the original meaning of

the document; 6. Words must be read in the context of the document as a whole; 7. Words should so far as possible be given their ordinary meaning; and if the language is unambiguous the court must apply it unless the result is commercially absurd; 8. If the words used are ambiguous, in the sense of being capable of more than one construction, the court should adopt the construction that appears most likely to give effect to the commercial purpose of the agreement and to be consistent with business common sense; but there is a correlation between the degree of ambiguity and the persuasiveness of a common sense construction, so that the greater the ambiguity, the more likely it is that the court will adopt a construction based on common sense, and vice versa." 12. Where there is a latent ambiguity in a contract passed before the Royal Court the Court in *Minister for Infrastructure -v- Parish of St Helier*

- [2016] JRC 153 said: "35. We would add to the above, as an exception to the rule that evidence of the parties' objective [sic] intentions is inadmissible, the ability of the Court to look to extrinsic evidence in a case of latent ambiguity (*La Petite Croatie Limited -v- Ledo JCA* at paragraph 19), an exercise to be approached with caution in relation to contracts passed before the Royal Court in order to maintain certainty and the integrity of the Registry. Any such evidence must, in any event, be probative. ...
37. It seems to us that the same point can be made in relation to contracts passed before the Royal Court, because once registered such contracts form the basis upon which members of the public may in the future acquire, or take security over, the land concerned. Such contracts should be interpreted by reference to the document as a whole and such facts as any reader researching title would reasonably be supposed to know." 13. It may at this point also be appropriate to emphasise the importance of the terms of the contract actually entered into. In *Grove and Briscoe -v- Baker*
- [2005] JLR 348 at para 10, the Court said:- "The old maxim is *la convention fait la loi des parties*. The Court is not empowered to rewrite contracts into which parties capable of contracting have entered with their eyes open. If there is a defect of consent, the Court may of course treat the contract as null; additionally the Court may in certain circumstances imply certain terms into the contract and modify it in that way. But in general terms, the Court has no jurisdiction to remake contracts which the parties have made of their own free will." Passing a contract before Court 14. That principle is even more important when looking at a contract passed before the Court. In *Fogarty -v- St Martin's Cottage Limited*
- [2015] JRC 068 at para 33 the Royal Court said this:- "There is more than just that certainty principle involved. Where parties to a transaction freely come to Court and take an oath to abide by the terms of the contract on pain of perjury, it is unthinkable for a Court to pay only lip service to that act. The principles underlying *la convention fait la loi des parties* are given added impetus by the fact that the contracting party has sworn on oath to abide by the terms of the contract. Such contracts can be set aside on the usual grounds of *dol*, *erreur* or *lesion*, because all those principles go to the fundamental free will or *volonté* of the contracting parties; but, that apart, what is found in the Public Registry can be relied

upon." 15. In *Carry -v- Liston*

- [2017] JRC 144 at para 34, the Royal Court added to the observations in *Fogarty* in the following terms:- "We endorse what has previously been said about the public nature of registering the contracts passed before the Royal Court and how it forms the starting point for anyone interested in ascertaining to whom a particular parcel of land belongs. This Court similarly recognises that the oath taken by the parties to the contract, whether in person or through their attorneys, on pain of perjury is of great significance. It is implicit in that act that the party so bound is aware, or should be aware, and so fixed with constructive notice, of the terms by which he or she is agreeing to abide." *Representations* 16. In *Hong Kong Foods Limited-v-Gibbons*
- [2017] JRC 050 ("*Hong Kong Foods*"), citing *Kwanza* (below) at paragraph 134, the Court defined a representation as: "A statement of fact made by one party to the contract (the representor) to the other (the representee) which, while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract. A misrepresentation is simply a representation that is untrue." 17. A statement of opinion (unless not honestly held) is not a representation of fact; nor is a mere commendatory statement e.g. mere puff, accordingly neither of these, even if incorrect can amount to misrepresentation. 18. In *Hong Kong Foods*, at paragraph 145 of the judgment, the Court made clear the effect of a misrepresentation albeit innocent, on a contract. It said this:- "We consider that the preferable solution is to revert to the position which it seems to us was envisaged by the Royal Court and the Court of Appeal in the earlier misrepresentation cases prior to *Steelux* and *Sutton* and to hold that a contract induced by innocent misrepresentation is voidable rather than void. This protects the position of bona fide third parties and also gives the Court and the Plaintiff flexibility as to whether rescission and/or damages is the appropriate remedy. It seems to us that that can be achieved by continuing to regard misrepresentation as a principle of Jersey contract law which stands alone rather than seeking to shoehorn it into the structure of a *vice du consentement* with all the undesirable consequences which may follow." 19. I am conscious that in citing this passage, which was obiter, the Court was there considering whether Jersey law required that a misrepresentation was a '*vice de consentement*' and accordingly caused a contract to be void *ab initio* instead of merely voidable. That does not fall to be considered here. The genesis of the *tout tel* clause/*Kwanza Hotels Limited -v- Sogeo Company Limited* 20. The current form of the *tout tel* clause flows directly from the judgments of the Royal Court and of the Court of Appeal in the case of *Kwanza Hotels Ltd -v- Sogeo Company Limited* ([1981] JJ 59 Royal Court; [1983] JJ 105 Court of Appeal). 21. The Royal Court in *Kwanza* was called upon to consider the questions of both misrepresentation and implied terms in the contract of sale of a guest house. At page 4 of the judgment *Ereaut*, Bailiff, characterised two of the three questions he was called upon to answer in the following terms:- "1. Did the description of the chalet by or on behalf of the defendant company as "owners accommodation" amount in law to a representation, express or implied:

- (a) that the chalet had been legitimately constructed with all the necessary consents;
 - (b) that the chalet was constructed in accordance with the necessary building bye-laws; and
 - (c) that the chalet was fit for use as human habitation?
2. Was there implied in the contract of sale the following terms; (a) that the chalet had been legitimately constructed with all the necessary consents; (b) that the chalet was constructed in accordance with the necessary building bye-laws; and (c) that the chalet was fit for use as human habitation?" 22. In dealing with the first question the Royal Court at page 4 said this:- "Counsel for the plaintiff company referred to the local cases of Scarfe -v- Walton

[1964] JJ 387 and McIlroy -v- Hustler

[1969] JJ 1181 both of which concerned misrepresentation. The judgments in those two cases set out certain general principles as to the law of Jersey on misrepresentation and cited the works of Terrien, Poingdestre, Domat and Pothier. Those judgments also stated that it had been the practice of the court for many years to have regard also to the law of England in cases where no clear precedent was to be drawn from the law of Jersey, and that because the principles enunciated by Domat and Pothier had much in common with the law of England relating to misrepresentation, the court had arrived at its decision and had regard both the civil law and the law of England. When giving my decision on the second question before me I shall consider the civil law, which differs substantially from the law of England, but in answering the first question I shall confine myself to the law of England, which I believe, on this matter, to be the same as the law of Jersey." 23. The Court then went on to answer the first question posed above in the negative. In other words, the vendor had made no representation. 24. A further argument for the Plaintiff in that case was that the absence of the necessary consents for the occupation of the chalet as dwelling accommodation was a "vice caché" or hidden defect and that a buyer was entitled to rescind the contract even though the defect was not known to the seller. There was, it was argued, an implied warranty that there were no such "vices cachés". 25. After examining the authorities the Royal Court, at page 77 said this:- "I have come to the conclusion, therefore, that the Law of Jersey is that on the sale of real property there is an implied warranty that there are no "vices cachés". However, that conclusion is by no means the end of the matter because under the law of Jersey the only means of effectively transferring title to real property is by passing a deed before the Royal Court, and it is usual for all such deeds to include a clause which begins: "Le tout tel qu'il est . . ." Such a clause was inserted in the deed passed in this case. It is clear from the authorities that the parties can, if they so wish, negate the implied warranty. Poingdestre, *Les Lois et Coutumes de Jersey*, at 102 (1928), states- "En tous Contracts les parties contractantes peuvent de consentement mutuel, s'obliger l'un l'autre a des garanties extraordinaires . . . et aussy peuvent ils se descharger l'un l'autre des garanties ordinaires." Domat, *op. cit.* at para. 13, adds the following- "XIII "Si un heritage est vendu comme il se comporte, ou ainsi que le vendeur en a bien et duement joui, ou avec ses droits et conditions; ces expressions et autres

semblables, n'empêchent pas que le vendeur ne demeure garand des servitudes cachées, et des charges inconnues: comme seroit une rente fonciere à laquelle l'héritage feroit asseris." The words "le tout tel qu'il est" must be deemed to have some meaning and I consider that they are similar to the expressions referred to in Domat, and mean that the purchaser takes the property as he finds it. However, the passage just quoted does draw, it seems to me, a distinction between "vices cachés" which affect title and those which do not. The implied warranty as to title remains, but in other respects is negated. It is interesting to observe that the passage previously quoted from Halsbury also excludes defects of title." 26. Accordingly the answer to the second question was also in the negative. The implied term that there were no "vices cachés" had been negated by the "le tout tel qu'il est ..." clause. 27. In Kwanza the form of clause that the contract contained and which was considered by the Royal Court was in the form that was invariably at that time used in contracts of sale of land. All contracts at that time were written in the French language and the standard clause read as follows:- "Le tout tel qu'il est avec tout et autant de droits appurtenances et dependences comme en peut appurtenances situé en la Paroisse de St Helier...". 28. The clause in that form may be translated as follows:- "The whole such as it is with all and as many rights appurtenances and dependencies as may belong thereto situated ..." 29. It is important in my view to understand what the Royal Court in Kwanza was determining. It was not determining whether or not the tout tel clause which applied at that time had an exculpatory effect with regard to representations. The court had already dealt with the question of misrepresentation by determining that there were no representations as alleged made by the vendor in the first place. The ambit of the tout tel clause, insofar as it may relate to representations, was not part of the Royal Court's determination. 30. The Royal Court was, however, dealing with the effect of the tout tel clause, in the form that then existed, on the question of implied terms and held that the formulation of the clause was sufficient to negate any implied terms other than that as to title. 31. The matter went to the Court of Appeal and that court upheld the decision of the Royal Court. The Court of Appeal did not consider that there had been a misrepresentation nor did it consider the effect of the tout tel clause if there had been a misrepresentation. Furthermore, the Court of Appeal concluded that there was no vice caché in the property sold and said this:- "Had we found that there was a vice caché, we should have had to go on to consider whether the implied warranty was negated by the "le tout tel qu'il est ..." clause in the deed passed before the Royal Court. On our conclusion that question does not arise, and we express no view of it." 32. It is interesting to note that no similar paragraph appears after the determination that there was no representation. It may be inferred that the Court of Appeal thought that a similar question would not arise with regard to the effect of the tout tel in the case of misrepresentation. 33. The Court of Appeal did however consider the question as to whether, had there been a misrepresentation, "the action [should] be dismissed because the appellants did not take the precautions which a prudent purchaser would have taken to verify this" (at 122). The Court concluded, however, at 124 that there is no obligation on a purchaser to verify the truth of representations of fact made by a vendor: "In our judgment the buyer is as much

entitled in such a case as in any other case to rely on the seller's representations." 34. Further, the Court of Appeal observed, at p114: "It follows from our view of the meaning of the advertisement and the particulars not only that there was no misrepresentation but also that there was no express warranty either included in the contract of sale or collateral, to the same effect as the misrepresentation for which the Appellants contended. We therefore turn to the second question [viz the implied terms and the implied warranty of no vices cache which is what the tout tel clause now excludes]. The answer to this depends upon the extent of the responsibility of a vendor, in the absence of any misrepresentation or express warranty, for defects of the thing sold." [my emphasis] 35. In my view the Court of Appeal recognised the principle that misrepresentation operates separately from express or implied contractual warranties. 36. The Court of Appeal considered, but did not rule on, the question whether the implied warranty as to the absence of vices cachés was negated by the tout tel clause which was present in that conveyance. In answering the second of the three questions before it, the Court found that there was no vice caché in that case so the issue did not need to be decided. 37. It was following the judgment of the Court of Appeal in Kwanza that the tout tel clause in its present form was adopted and became the standard clause. This change was a direct response to the decision in Kwanza . 38. The current tout tel clause (in French, as it was originally drafted and which takes precedence) states: "Le tout tel qu'il est avec tout et autant de droits, appurtenances et dépendences comme en peuvent appartenir et dans l'etat ou il se trouve avec tous ses vices apparents ou caches, s'ils existent...". [my emphasis] 39. It can be readily seen that the variation between the new clause and that considered in Kwanza is simply the addition of the words " et dans l'etat ou il se trouve avec tous ses vices apparents ou caches, s'ils existent ". In other words it adds the terms "i n the state in which it is with all its apparent or hidden defects if any ...". The amendment makes no reference to representations whether innocent or otherwise even though the question of representations was key in the judgments of both the Royal Court and the Court of Appeal in Kwanza . It would not have been difficult, had it been the intention to include exculpatory words to deal with innocent misrepresentations, to include them expressly possibly by the inclusion of an "entire agreement" provision that is often found in commercial contracts. Furthermore, the words actually introduced appear to be dealing with the second part of the judgment of the courts in Kwanza , namely the implied warranty that there were no vices cachés. The words appear to me to be introduced to strengthen the original formulation of the clause which had not as to its effect been affirmed by the Court of Appeal which had not dealt with it. 40. I should at this point interject that the Defendant sought to deploy an affidavit sworn by Advocate Richard Falle in the evidence before me. Advocate Falle, who is a senior and eminent lawyer was, it may be noted, one of the counsel in the Kwanza case. To the extent that the affidavit purported to contain opinions of Jersey law I of course did not consider it. The Court is the arbiter of what the law of Jersey is on any particular matter and the opinion of counsel, no matter how eminent, contained in an affidavit and sought to be proven therefore as a matter of fact, must be irrelevant. 41. Advocate Falle did, however, write an article in the Jersey Law

Review in June 2004 under the title " The structure of a pro-forma Jersey conveyance ". At paragraph 31 of his article Advocate Falle says this of the revised form of the tout tel clause: "... In a typical conveyance, the purchaser will now, and save for his remedy in the case of deliberate misrepresentation, take the property "warts and all", whether apparent or hidden at the time of the conveyance. This has imposed a heavier burden of enquiry upon the purchaser and, on those who advise him, a greater duty of care hitherto." 42. It appears, from this excerpt, that Advocate Falle expresses the view that a purchaser will have a remedy for " deliberate misrepresentation " but, presumably, because Advocate Falle does not mention it, not that the purchaser has any remedy for innocent misrepresentation. That is, of course, an expression of opinion. 43. An amount of English authority was cited to me. Whilst I have considered it, I do not consider that it assists me in particular. 44. De La Haye-v-AG

[2010] JLR 218 , in which the Court of Appeal said at para 79:- "We would add a more general observation about the value of English case law as persuasive authority in Jersey. There are areas, such as the law of real property or inheritance laws, where Jersey has developed a distinctive body of legal principle, derived from sources (generally Norman customary law) which are quite independent of the English common law. In these areas, it is generally neither necessary nor useful to refer to English cases." The argument for the Plaintiff's interpretation 45. The Plaintiff accepts that in customary law there is an implied warranty that a property is sold free of hidden defects and that the new version of the tout tel clause (which followed the Kwanza case) and particularly the addition of the words " vices apparents au cachés " confirms that the risk of patent and latent defects falls on the buyer other than in cases of fraud. The Plaintiff accepts also that it would have been possible to convert any representations made during the course of the pre-contractual negotiation to contractual warranties or indeed to suggest an amendment to the tout tel clause. That did not happen. 46. It is the Plaintiff's case, however, that no such adjustment to the clause was necessary in this case because the language of the tout tel clause does not have the reach to exclude a claim for a pre-contractual misrepresentation. The Plaintiff argues that express words of exclusion would be required or language that admitted of no other meaning and the Plaintiff points to an absence of authority to the contrary. 47. It is of relevance, as the Plaintiff argues, that the fact that a misrepresentation has been made would, under English law, make a contract subject to a claim in rescission. In Emmett and Farrand on Title (19th Edition) 1986 at paragraph 4.026 the authors state:- "Further, a vendor is not bound to disabuse the purchaser of any erroneous belief which the purchaser has formed, and which the vendor knows he has formed, as to the quality of the property purchase. The result is that, provided the vendor has not been guilty of any misdescription or misrepresentation, he "may well sell a house which has got dry rot in all the woodwork, and is badly drained, to a purchaser, who knows nothing of these defects, who believes to the knowledge of the vendor that the house is in good repair and well drained and yet the purchaser will not be entitled to claim the rescission of the contract..." The argument for the Defendant's interpretation 48. The Defendant argues that the tout tel

clause clearly extends to cover all defects that exist in a property, whether apparent or hidden, save to the extent that there was a fraudulent misrepresentation on the part of the Defendant in relation to the existence of such defects. 49. The Defendant argues that the use of the tout tel clause was intended and generally understood to place the risk of all hidden and apparent defects squarely on the respective purchaser and relies on the fact that the pre-conveyance correspondence was conducted under the heading " subject to contract ". Furthermore, so the Defendant argues, the effect of pre-contractual enquiries are not thereby negated because they can nonetheless assist a potential purchaser to decide if they wish to buy the property or not, they may lead to further enquiries, or if the purchaser wishes to bind the vendor to any of the answers given they can request the insertion of warranties into the conveyance or indeed remove or vary the tout tel clause. Naturally a deliberately false representation (which would amount to dol) would be actionable. 50. The Defendant goes on to argue that for the Plaintiff to prevail, the Court must adopt a construction of the clause which excludes the defects claim brought in breach of contract but does not exclude a claim framed in innocent misrepresentation arising out of pre-conveyance correspondence. This, so the Defendant argues, would render it unsafe for any vendor to answer any pre-sale questions. The Defendant argues that this would " tip the balance of the conveyancing process so far in favour of the purchaser that no properly advised vendor would answer it ". 51. The Defendant goes on in response to the Plaintiff to assert that the new tout tel clause has shifted the risk with regard to hidden and latent defects to the purchaser.

Conclusion

52. In my view the Plaintiff's interpretation and argument is to be largely preferred. 53. The starting point must of course be the words used in the clause. The words to be construed within the clause are, as I have indicated:- "... in the state in which it was at the date of sale with all its apparent or hidden defects (vice caché), if any,..." 54. It seems to me that those words must be taken together and mean that the purchaser is taking the property with all its apparent or hidden defects. It does not expressly deal with or cover the position where a representation has been made upon which the purchaser has relied. I do not think that it is possible to extend the meaning of the clause to cover circumstances in which the position of a hidden defect (where the risk is, as was set out by Ereaut Bailiff in the Royal Court hearing of Kwanza , on the purchaser) has been qualified by a positive representation made by the vendor. 55. In my judgment the revised wording, as is to my mind clear from the French iteration of the clause, is restricted to a clear extension of the ambit of the clause to be certain that it covers vices cachés. This was the subject matter to which the clause was related in Kwanza and which the Court of Appeal did not in fact consider. 56. I am reinforced in this view by my analysis of Kwanza set out above. The Royal Court, when it considered the earlier form of the clause, was considering vices cachés. It was not considering misrepresentation. The Court of Appeal although it did not confirm (because it did not need to) the effect of the clause was equally not considering misrepresentation with regard to the

clause. As I have said, everything in the Court of Appeal judgment to my mind points to the fact that the Court considered that misrepresentation stood separately from the effect of the tout tel clause. 57. As I have said, there is no mention in the revised wording of the consequences when positive representations have been made about certain physical aspects relating to the property in pre-contractual correspondence. In my judgment clear wording would need to be incorporated into any such provision to remove the Plaintiff's right to sue on misrepresentation. No such wording is included and it would not have been difficult, had that been the clear intention in the clause, to include such wording. 58. Although conscious of the caution necessary when approaching the English law on construction of a Jersey contract I am supported in my view in *The Interpretation of Contracts* (6th Edition) Sir Kim Lewison where the learned author states: "The court has therefore insisted that a party who wishes to relieve himself from a legal liability must do so in clear words. Thus in *Szymonowski & Co -v- Beck & Co* [1923] 1 KB 457, Scrutton LJ said: "Now I approach the consideration of that clause applying the principle repeatedly acted upon by the House of Lords and this Court that if a party wishes to exclude the ordinary consequences that would flow in law from the contract he is making he must do so in clear words." And in *White -v- Warwick (John) & Co Ltd*

[1953] 1 WLR 1285, Denning LJ said: "In this type of case, two principles are well settled. The first is that, if a person desires to exempt himself from a liability which the common law imposes on him, he can do so by a contract freely and deliberately entered into by the injured party in words that are clear beyond the possibility of misunderstanding." These principles have survived the five principles of interpretation formulated in *Investors Compensation Scheme -v- West Bromwich Building Society* [1998] 1 WLR 898, although they are not to be applied as rigid rules. Lord Bingham of Cornhill reiterated: "This clause must be construed in the context of the contract as a whole. The general rule should be applied that if a party, otherwise liable, is to exclude or limit his liability or to rely on an exemption, he must do so in clear words; unclear words do not suffice; any ambiguity or lack of clarity must be resolved against that party." 59. It seems to me that this principle is equally applicable to interpretation of contracts in Jersey law. 60. If I were to take the view that the clause is ambiguous, which I do not, I would nonetheless have held that the common sense interpretation is that the effect of pre-contractual representations cannot be ignored and the clause could not be reasonably interpreted to remove the legal effect of a representation. 61. If the Defendant's interpretation of the clause is correct that would render nugatory much if not all of the pre-contractual correspondence and inquiries. It would not matter what answer was given to any question provided the answer was not deliberately misleading or false. I am accordingly not persuaded of the force of the Defendant's argument that the pre-contractual assertions on the part of a vendor are still of value (on the Defendant's interpretation of the tout tel clause) because they assist a potential purchaser to decide if they wish to buy or may lead to further enquiries. It seems to me that any pre-contractual enquiries can only have the potential outcome argued for by the Defendant if and to the extent they are answered accurately. How is a prospective

purchaser better informed about whether to proceed with the contract or make further enquiries if the answers given to such enquiries are not accurate? If a material inaccuracy carries with it no consequences because of the all-encompassing effect of the tout tel clause it seems to me that the Defendant's argument leads to a position where the answers to pre-contractual enquiries could be inaccurate or careless but provided they are not fraudulent or deliberately false, nonetheless offer the deceived purchaser no recourse. 62. Nor am I persuaded that the Plaintiff's interpretation would render it unsafe for any vendor to answer any pre-sale questions. In my view that might well be the case if one anticipates that the vendor's lawyers would answer such questions inaccurately or without due enquiry. It seems to me, however, that the Defendant's argument overstates the position. It will be perfectly possible for a vendor in answer to any question to express limitations on the extent to which they have made enquiries or the extent to which they have been able to research the point or indeed as to their knowledge generally. There may be answers to pre-conveyancing questions that can be answered with absolute certainty and clarity by a vendor and others which cannot. It is open to the vendor, in answering such questions, to express those answers in ways that make it clear that they can be relied upon as to their finality or accuracy by a purchaser or cannot. In other words there might be a positive representation or merely an answer not amounting to a representation that is as helpful as possible. That is a matter to be made clear on the face of the pre-contractual correspondence. 63. I do not disagree with the Defendant's argument that the risk with regard to hidden and latent defects are with the purchaser. I think the current tout tel clause reinforces the finding of the Royal Court to that end, but not, in my judgment, in circumstances in which the absence of such a defect has been made the subject of a positive representation on which the purchaser has relied. In my judgment 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 a 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. 64. Whilst it is correct that Kwanza was dealing with a different form of the tout tel clause, the changed form of the clause does not, in my judgment, reach far enough to cover any misrepresentation and accordingly the statements of the Court of Appeal in Kwanza that suggest that misrepresentation continues to be available are an accurate statement of the position. 65. The Defendant's argument that because the subject matter of the claim deals with latent defects, it is covered by the tout tel clause, even though pleaded in the form of misrepresentation, ignores to my mind the very important argument that the situation changes where a positive representation is made. It would not to my mind accord with the justice of the case were a defendant who has made the false representation (albeit innocently) on which a purchaser has relied to be comforted about the purchase or to make no further enquiry, to be able to rely on a clause such as the tout tel. 66. Accordingly, for the above reasons, I answer the question posed by way of a preliminary issue and set

out at paragraph 5 above in the negative. In other words, the alleged liability of the Defendant for claims advanced by the Plaintiff in her Order of Justice are not excluded by operation of the tout tel clause to the extent that those claims are pleaded in misrepresentation. 67. I am not, of course, expressing any view on whether the claims in the pleadings of misrepresentation are well made. Authorities Mackie v Scott

[2017] JRC 179 . Parish of St Helier -v- Minister for Infrastructure

[2017] JCA 027 . Minister for Infrastructure -v- Parish of St Helier

[2016] JRC 153 . Grove and Briscoe -v- Baker

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