Case No: A3/2017/0628/0629/0630

Neutral Citation Number: [2018] EWCA Civ 1396

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, CHANCERY DIVISION

Mr Michael Brindle QC (sitting as a Deputy High Court Judge)

HC-2015-004437

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 19/06/2018

Before :

LORD JUSTICE LEWISON

LORD JUSTICE LEGGATT

and

SIR COLIN RIMER

- -

Between :

(1) **FIRST TOWER TRUSTEES LTD** **Appella**

(2) **INTERTRUST TRUSTEES LIMITED**

- and -

CDS (SUPERSTORES INTERNATIONAL) LIMITED **Respond**

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MR ALAN STEINFELD QC & MR MATTHEW WATSON (instructed by **CMS Cameron McKenna Nabarro Olswang LLP)**) for the **Appellants**

MR EDWIN JOHNSON QC (instructed by **Ashfords LLP**) for the **Respondent**

Hearing dates : 22nd and 23rd May 2018

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Judgment

Lord Justice Lewison:

Introduction and background

1.
This appeal arises out of a misrepresentation which preceded the grant on 30 April 2015 of a lease of Bays 1-3 Dearne Mill, Darton, Barnsley and entry into an agreement for lease of Bay 4 on the same day. In each case, unknown to the tenant, but known to the landlords or their agents, the Bays were so contaminated with asbestos that they were dangerous to enter. Mr Michael Brindle QC, sitting as a judge of the Chancery Division, held that the landlords were liable, and gave judgment against them for £1.4 million plus interest. His judgment is at [2017] EWHC 891 (Ch), [2017] 4 WLR 73.

2.
The misrepresentation was contained in replies to enquiries before contract. Enquiries before contract form an important part of ordinary conveyancing, both residential and commercial. In an ideal world sellers would behave in the way that Farwell J described in Terrene Ltd v Nelson [1937] 3 All ER 739:

“In the ordinary case, a purchaser has to go for his information to the vendor, but, bearing in mind the principle of caveat emptor, he is bound to make proper inquiries for himself. But he must, in almost every case, in the first instance, at any rate, seek his information from the vendor, who knows the facts, whereas the purchaser probably does not know them. When a purchaser, with a possible view of making an offer for the property, seeks information from the vendor, the vendor, of course, is bound to the best of his ability to supply him with accurate information.” (Emphasis added)

3.
However, the world is not ideal and the buyer often meets a stonewalling response, saying no more than the buyer must satisfy itself.

4.
Bays 1 – 4 were warehousing accommodation in a building owned by First Tower Trustees Ltd and Intertrust Trustees Ltd. Both these companies were registered in Guernsey and were described in the transactional documents as trustees of the Barnsley Unit Trust. The significance of this will become apparent in due course. The intending tenant was CDS (Superstores International) Ltd, a retailer which trades as The Range.

5.
Before contract the tenants were given a copy of a report prepared by an organisation called S2 which, according to the landlords, related to Bays 1 to 3. That report indicated to CDS that there was no problem with asbestos. At trial, however, the landlords asserted that the report in fact related to quite different property. How this came about is mysterious, but the judge was not required to make and did not make any findings about that.

6.
More importantly, CDS through its solicitors raised enquiries before contract on a Commercial Property Standard Enquiries form. The landlords’ solicitors answered them on 16 February 2015. The enquiries themselves are preceded by an interpretation section, the material parts of which are as follows:

“4. The Buyer acknowledges that even though the Seller will be giving replies to the enquiries, the Buyer should still inspect the Property, have the Property surveyed, investigate title and make all appropriate searches and enquiries of third parties.

5. In replying to each of these enquiries and any supplemental enquiries, the Seller acknowledges that it is required to provide the Buyer with copies of all documents and correspondence and to supply all details relevant to the replies, whether or not specifically requested to do so.

6. The Seller confirms that pending exchange of contracts or, where there is no prior contract, pending completion of the Transaction, it will notify the Buyer on becoming aware of anything which may cause any reply that it has given to these or any supplemental enquiries to be incorrect.”

7.

Enquiry 15.4 (b) asked for details (so far as the Seller was aware) of the existence of any hazardous substances including asbestos or asbestos containing materials. The reply was: “The Buyer must satisfy itself”. Enquiry 15.5 asked for details of notices, correspondence relating to real or perceived environmental problems that affected the property, including communications relating to the actual or possible presence of contamination at or near the property. The reply, so far as material, was: “The Seller is not aware of any such notices etc but the Buyer must satisfy itself”. Enquiry 15.7 asked for details of any actual, alleged, or potential environmental problems (including actual or suspected contamination) relating to the property. The answer was: “The Seller has not been notified of any such breaches or environmental problems relating to the Property but the Buyer must satisfy itself”.

8.
On 16 April 2015 the landlords’ agents received a copy of a report produced by a company called William Martin Firefly Limited which indicated that there was some asbestos in the Bays. On 20 April 2015 the landlords’ agents received an email from VPS, a specialist firm that they had used. That reported a health and safety risk caused by asbestos near the loading bay. The email also stated:

“Please be advised that we have added a notice onto our system and we are unable to enter this property until we receive the relevant confirmation from yourselves that the site is safe. This would have to be in the form of a clean air certificate or asbestos report.”

9.
The remarks of VPS related specifically to Bays 1–3, which were untenanted at the time, but they also raised the possibility that Bay 4, at that time let to Kingspan Ltd, might be unsafe to enter for the same reason.

10.
Despite the terms of paragraph 6 of the interpretation section of the Enquiries form, none of this information was passed on to CDS before completion of the lease and agreement for lease on 30 April 2015.

The judgment

11.
The judge was in no doubt that the representations were false. As he put it at [12]:

“The S2 report was represented to relate to bays 1–4, but according to the claimants’ own pleaded case it did not. It said nothing relevant about the asbestos problem which existed and prevented the premises from being occupied until remedial work was carried out. This is made patently clear by the VPS e-mail, of which the defendant had no knowledge until after the lease and agreement had been entered into. It has been stressed on behalf of the claimants that the defendant had significant remedial work to do in any event, on a not insubstantial scale, but this does not in my judgment derogate from the clear fact that the premises required substantial further work to remedy the asbestos problem, which was wholly contrary to what the defendant had been told before the lease (and the agreement for a lease) were entered into. I should note that I reject the submission that this report was somehow out of date.”

12.
He considered that although there might be arguments about which enquiry was the relevant one, there was a clear case of misrepresentation under enquiry 15.7 at least in relation to the email from VPS. There is no appeal against his conclusion.

13.
Having so found, the judge had to consider whether the landlords had any defence. No one gave evidence on the landlords' side. They relied on particular clauses in both the lease and the agreement for lease as relieving them of potential liability.

14.
Clause 5.8 of the lease (which related to Bays 1-3) provided:

"The tenant acknowledges that this lease has not been entered into in reliance wholly or partly on any statement or representation made by or on behalf of the landlord."

15.
Clause 12 of the agreement for lease (which related to Bay 4) contained the following:

"12.1 The Tenant acknowledge and agree [sic] that it has not entered into this Agreement in reliance on any statement or representation made by or on behalf of the Landlord other than those made in writing by the Landlord's solicitors in response to the Tenant's solicitors' written enquiries.

12.2 Nothing in this Agreement shall be read or construed as excluding any liability or remedy resulting from fraudulent misrepresentation."

16.
The judge held that clause 12 of the agreement for lease did not help the landlords because the representation was indeed made by the landlords' solicitors in response to written enquiries. There was debate before him whether clause 5.8 of the lease was a so-called "basis" clause or an attempt to exclude liability for misrepresentation. He decided that it was the latter; and went on to hold that it did not satisfy the test of reasonableness under section 11 (1) of the Unfair Contract Terms Act 1977. Those conclusions which grounded his decision on liability are challenged on this appeal.

17.
The judge went on to consider whether the fact that the landlords had entered into both the lease and the agreement for lease "in their capacity as trustees of the Barnsley Unit Trust and not otherwise" operated to limit their liability for statutory liability for damages for misrepresentation. He held that although words to that effect may limit a trustee's liability in contract they did not have effect to limit the trustees' exposure to that statutory liability. That conclusion is also challenged on this appeal.

18.
Allied to this point is an application for permission to appeal against the judge's refusal, on the first day of the trial, to permit the landlords to amend their statement of case to plead reliance on Article 32 of the Trusts (Jersey) Law 1984 which, it was alleged, gave rise to another way of limiting the landlords' liability.

19.
In assessing damages, the judge recorded at [42] that damages were claimed under three heads: (1) the costs of asbestos remedial work, (2) The costs of alternative warehouse accommodation whilst Bays 1–3 were incapable of use, and (3) The costs of alternative warehouse arrangements as a result of the loss of Bay 4. At [43] he said:

"It has not been suggested by the claimants that these are inappropriate as heads of damage, or that the measure of damage should be computed on any other basis."

20.

The judge rejected the argument that CDS were precluded from claiming damages in relation to Bay 4 because they terminated as a result of a failure to agree the costs of necessary works rather than for breach. He did, however, accept the landlords' argument that the period for which damages were claimed was too long. As to that, the judge commented at [49]:

"There is no evidence as to how long it would have taken the defendant to find an alternative, and it may be that in fact it did not do so and will not do so until the new distribution centre comes on stream. That would argue for no loss at all, but that was not argued…"

21.
However, in this court the landlords ask for permission to amend the grounds of appeal so as to take the point that the measure of damages adopted in relation to Bay 4 was indeed the wrong measure of damages as a matter of law. They wish to argue that CDS suffered no loss (with the possible exception of some conveyancing costs).

Amendments

22.
I will deal first with the proposed amendments. The first of these concerns the judge's refusal to permit the landlords to amend their statement of case to plead reliance on Article 32 of the Trusts (Jersey) Law 1984. The argument is that Article 32 would limit the landlords' liability to the value of the assets of the Barnsley Unit Trust which they say is insolvent. It must be said at once that if permission to appeal were to be granted on this point, it would be an appeal against a case management decision by the trial judge. In Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537, [2014] 1 WLR 795, at [52], this court said:

"We start by reiterating a point that has been made before, namely that this court will not lightly interfere with a case management decision. In Mannion v Ginty [2012] EWCA Civ 1667 at [18] Lewison LJ said: 'it has been said more than once in this court, it is vital for the Court of Appeal to uphold robust fair case management decisions made by first instance judges.'"

23.
If I may repeat something else I have said before (Broughton v Kop Football (Cayman) Ltd [2012] EWCA Civ 1743 at [51], approved in Prince Abdulaziz v Apex Global Management Ltd [2014] UKSC 64; [2014] 1 WLR 4495):

"Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained."

24.
This was a very late application to amend to introduce a legal argument based on the law of a jurisdiction other than that of England and Wales. The judge directed himself by reference to the decision of this court in Swain-Mason v Mills & Reeve LLP [2011] EWCA Civ 14, [2011] 1 WLR 2735.

It is not and could not be suggested that he had the wrong principles in mind. The first matter that he considered was why the application had been brought so late. He clearly took the view that the decision not to rely on Article 32 at an earlier stage in the case was a deliberate one. That was the inference that he drew from the landlords' solicitors' email of 10 January 2017 in which they said:

"The reason the application is only being made at this stage is that it was not thought necessary to plead issues which were irrelevant to the merits of the claim and counterclaim but are only relevant to enforcement of any judgment."

25.
No explanation was given to the judge about why the proposed amendment was relevant to the merits of the claim or counterclaim. It is, however, suggested that the value of the assets of the Barnsley Unit Trust are far below the extent of the liabilities attaching to that Trust. But as the judge observed, if that contention were to have been maintained CDS would have been entitled to investigate the factual accuracy of that assertion. The landlords had adduced some evidence to support their assertion, but the judge ruled that it was either inadmissible or that it was too late for it to be adduced. As the judge rightly observed, he could see no reason for imposing on CDS the need to counter any of that evidence. Counsel appearing for the landlords at the time accepted that position.

26.
The judge went on to say that the argument based on Article 32 was an argument based on foreign law. He decided that even if it were possible for an English court simply to construe the Law, CDS were at least entitled to an opportunity to investigate Jersey law before having to confront the argument. Having identified that there was a real problem about the admissibility of the Law he said that there was also a "real problem about fairness to the defendant in dealing with the matter."

27.
He also recorded that counsel for the landlords stated that he was not seeking to say that it was known to CDS before entering into the transactional documents that they were dealing with trustees in one capacity or another. Thus the point taken on Article 32 was no extension of the legal effect in English law of the description of the trustees in the lease and agreement for lease. The judge expressed his ultimate conclusion by saying:

"I make the decision because I am satisfied that, in this respect, there is real prejudice from the late amendment and the absence of either agreement or Civil Evidence Act 1972 notices in relation to foreign law."

28.
He repeated this in his substantive judgment at [51]:

"I refused that further amendment, since the extreme lateness of the application clearly prejudiced the Defendant, who was unable to research Jersey law in the time available."

29.
By way of ancillary application in this court the landlords seek to reintroduce not only the evidence that the judge rejected, and whose rejection counsel accepted as the price of permission to amend, but additional evidence on top which was neither in the trial bundle nor even disclosed. The purpose of the additional evidence is to run an argument that CDS did know that the landlords were trustees of the Barnsley Unit Trust before entry into the transactional documents, which is flatly contrary to the position that the landlords adopted before the judge. The additional evidence was plainly available

at trial, and therefore fails to satisfy the first criterion in Ladd v Marshall [1954] 1 WLR 1489. Mr Steinfeld QC, on behalf of the landlords, also accepted that his point on Article 32 would fare just as well without the additional evidence which, he said, should be admitted “to complete the picture”. On that basis it fails to satisfy the third criterion in Ladd v Marshall as well. I would dismiss that ancillary application.

30.
That, then, leads to the question whether an appeal against the judge’s decision to refuse permission to amend would have a real prospect of success. The argument is that under the terms of section 1 of the Evidence (Colonial Statutes) Act 1907 the court can construe the Trusts (Jersey) Law without the benefit of any expert evidence; and that the proposed amendment simply raises a question of law.

31.
In the first place I do not consider that this point simply raises a question of law. The fact that the trustees are companies registered in Guernsey does not establish that the proper law of the trust is Jersey law. Second, at least at the time of the hearing before the judge there was considerable doubt about the effect of Article 32. Even now there are questions difficult enough to have divided opinions in the Judicial Committee of the Privy Council: Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd [2018] UKPC 7, [2018] 2 WLR 1465. That case decides at [61] (ii) that Article 32 does not cap a trustee’s liability; and at [79] that all it does is to limit the class of assets to which a creditor may have recourse for enforcement of a debt. But since the landlords have in fact paid all sums that the judge ordered to be paid, the question of enforcement no longer arises. In addition clause 8.1 of the lease contains a choice of law clause (choosing that of England and Wales) expressed in very wide terms. That says (among other things) that both contractual and non-contractual liability in connection with the lease are to be governed by the law of England and Wales. One question that would have arisen is the effect of Article 32, as a matter of Jersey law, faced with a clause of that kind. Is it, for example, possible to contract out of or waive limited liability? In English law it is often possible to waive statutory protection, of which the waiver of a defence under the Limitation Act 1980 is the most obvious example. The position under Jersey law may not be simply a question of construction of the Jersey Law itself; but may require investigation of a Jersey court’s general approach to the ability of a party for whose benefit protective laws are passed to waive that protection. The question may also arise whether it is sufficient for a counterparty simply to know that the trustees are trustees, or whether the counterparty must also know that they are trustees of a Jersey trust. Third, the judge’s decision was essentially driven by what he perceived as fairness to CDS. That perception cannot, in my judgment, be characterised as perverse. On the assumption that an English court is entitled to construe a Jersey law without the benefit of expert evidence, a party who is faced with an argument based upon foreign law must be entitled to sufficient time to carry out any necessary research into the effect of that foreign law in the jurisdiction to which it pertains. In addition I do not consider that the fact (if it be a fact) that the court is entitled to construe a foreign law put in evidence under the 1907 Act without expert evidence positively forbids a litigating party from relying on expert evidence about the effect of that foreign law. I note in this connection the unequivocal statement by Lady Hale (with whom the other justices agreed) in R (Barclay) v Lord Chancellor [2014] UKSC 54, [2015] AC 276 at [36]:

“It is not for the courts of England and Wales to interpret the law of the Channel Islands or decide what is law there. In so far as that task rests with the courts, it rests with the Island courts, culminating ultimately in the Judicial Committee of the Privy Council.”

32.

In my judgment, the judge was entitled to conclude that to deprive CDS of the opportunity of investigating (and if necessary calling expert evidence about) the effect of Article 32 was unfair. I do not consider that there are grounds upon which an appeal court could interfere with the judge's exercise of discretion.

33.
Accordingly, I would refuse permission to appeal against the judge's case management decision.

34.
The second proposed amendment is the amendment to the grounds of appeal in order to argue that the judge applied the wrong measure of damages to the misrepresentation in relation to Bay 4. It will be apparent from the extracts of the judgment that I have quoted that this is a complete volte face from the stance that the landlords took at trial, where the relevant heads of damage were not disputed. The argument for the landlords is that damages for misrepresentation recoverable under section 2 of the Misrepresentation Act 1967 are to be assessed on the tortious measure of damages, and that the judge in effect applied the contractual measure of damages. Moreover, the damages thus recoverable are limited to the loss caused by entry into the contract: Taberna Europe CDO II plc v Selskabet AF1 [2016] EWCA Civ 1262, [2017] QB 633 at [47]. If CDS had been told immediately before entry into the agreement for lease that there was asbestos in Bay 4 and in consequence had decided not to enter into the contract, it would still have been faced with the cost of acquiring storage space at very short notice. Thus the cost incurred in obtaining storage space at short notice is not a recoverable head of damage. It could only have been recoverable as damages in contract. In order for CDS to recover substantial damages it would have had to have pleaded and proved that by entry into the lease it had lost an opportunity to have acquired alternative storage space. That in turn would have required CDS to have identified what opportunities were available immediately before entry into he agreement for lease, and why those opportunities were unavailable thereafter. None of this was argued before the judge.

35.
An amendment to an appellant's notice requires the permission of the court under CPR Part 52.17. This court's general approach to such an application was authoritatively described by May LJ in Jones v MBNA International Bank (30 June 2000) at [52]:

"Civil trials are conducted on the basis that the court decides the factual and legal issues which the parties bring before the court. Normally each party should bring before the court the whole relevant case that he wishes to advance. He may choose to confine his claim or defence to some only of the theoretical ways in which the case might be put. If he does so, the court will decide the issues which are raised and normally will not decide issues which are not raised. Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought. The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in the case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a

case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed."

36.
It will be noted that May LJ treated both factual issues and legal issues in the same way, and that permitting an amendment to advance a new case on appeal is exceptional. Where the point in question would raise new questions of fact, or where it is possible that the course of evidence would have been different if the point had been made, the appeal court will almost always refuse to allow a new point to be taken on appeal: Mullarkey v Broad [2009] EWCA Civ 2 at [49]. But even where the new point raised is a pure point of law, the court retains a discretion to refuse to allow it to be taken. The court's reluctance to allow a new point to be taken is all the greater where the point was conceded or accepted before the trial court: Glatt v Sinclair [2013] EWCA Civ 241, [2013] 1 WLR 3602. The mere fact that the appellant has changed legal advisers following trial does not, in my judgment, bring the case into the exceptional category. Mr Steinfeld points out that on the pleadings CDS was put to proof of the loss and damage alleged. That is perfectly true. But in the skeleton argument prepared on the landlords' behalf for the trial itself, the only point taken by the landlords related to the length of time it had taken to start the remedial works. No separate point was taken about the measure of damages applicable to Bay 4. At [48] the judge encapsulated his approach to damages. He said:

"The fact that the agreement was not terminated expressly for breach does not mean that there was no misrepresentation inducing the contract. Absent the misrepresentation, the defendant would not have proceeded with the agreement for a lease at all. By entering into it, they have suffered losses so far as they have been unable, for some period at least, to make alternative warehousing arrangements."

37.
From this passage it seems to me to be clear that the judge was applying what he considered to be the tortious measure of damages: namely the loss that CDS suffered by entering into the agreement for lease. That is precisely the measure of damages vouched by Taberna. What loss was suffered as a consequence of entry into the agreement was essentially a question of fact. Whether the judge should have accepted that the loss claimed was in fact caused by entry into the agreement for lease is a different question which depended on the evidence. Since the factual basis for the claim was not challenged, it is difficult to fault the judge for having accepted it.

38.
In addition had the point now sought to be raised been argued at trial the judge would have had to explore the question whether the damages he awarded could have been claimed as consequential losses which may be recoverable in a claim of this kind: McGregor on Damages (20th ed) paras 49-061 to 49-065. I do not consider that it is a fair criticism of the judge that he assessed damages in the way in which he had been invited to assess them without dissent on behalf of the landlords. Nor do I accept that he had any obligation to question the parties' joint position. As May LJ said, a court will not normally decide issues that are not raised. I would refuse permission to amend the grounds of appeal.

Does section 3 apply to clauses 5.8 and 12.1?

39.

So I can turn to deal with the substantive points in the appeal. The first is whether clause 5.8 of the lease falls within the ambit of section 3 of the Misrepresentation Act 1967. At common law a contracting party was not liable in damages for misrepresentation unless the misrepresentation was fraudulent. That was changed by section 2 (1) of the 1967 Act which provides:

“Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.”

40.
Thus a representor has a defence to a claim for misrepresentation if he proves that he had an honest belief in its truth on reasonable grounds. The landlords did not attempt to prove that in this case. Section 3 (1) provides:

“If a contract contains a term which would exclude or restrict—

(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or

(b) any remedy available to another party to the contract by reason of such a misrepresentation,

that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does.”

41.
Clause 5.8 is a term in a contract. So the question is: apart from section 3 (1) does it exclude any liability to which the landlords may be subject by reason of any misrepresentation made by them before the contract was made? Looking at that question apart from authority, it seems to me that it can only be answered by enquiring what the position would have been if clause 5.8 had not been there. Absent clause 5.8, I consider that the position is clear. The landlords would have been liable for misrepresentation. The only reason why they may not be is the existence of clause 5.8. On the face of it, therefore, clause 5.8 is a contract term which would exclude liability for misrepresentation.

42.
It is of course the case that some clauses in a contract which might appear at first sight to be exclusion clauses do no more than delimit the primary obligations of one of the contracting parties. That was the issue that divided the Supreme Court in Impact Funding Solutions Ltd v Barrington Support Services Ltd [2016] UKSC 57, [2017] AC 73. Lord Toulson, in the majority, illustrated the point at [36] by quoting from the report of the Law Commission which preceded the passing of the Unfair Contract Terms Act 1977:

“If a decorator agrees to paint the outside woodwork of a house except the garage doors, no-one can seriously regard the words of exception as anything but a convenient way of defining the obligation; it would surely make no difference if the promise were to paint the outside woodwork with a clear proviso that the contractor was not obliged to paint the garage doors, or if there were a definition clause brought to the promisee's attention saying that ‘outside woodwork’ did not include the garage doors. Such provisions do not … deprive the promisee of a right of a kind which social policy requires

that he should enjoy, nor do they … give the promisor the advantage of appearing to promise more than he is in fact promising."

43.
Where, as a matter of interpretation of a non-consumer contract, the impugned term does no more than to describe one party's primary obligations there can be no question of applying the reasonableness test in the 1977 Act. In JP Morgan Bank v Springwell Navigation Corp [2008] EWHC 1186 (Comm) Gloster J put the point thus at [602] and [603]:

"There is a clear distinction between clauses which exclude liability and clauses which define the terms upon which the parties are conducting their business; in other words, clauses which prevent an obligation from arising in the first place….

Thus terms which simply define the basis upon which services will be rendered and confirm the basis upon which parties are transacting business are not subject to section 2 of UCTA. Otherwise, every contract which contains contractual terms defining the extent of each party's obligations would have to satisfy the requirement of reasonableness."

44.
It is in this sense, in my judgment, that the label "basis clause" in some of the cases is to be understood. The label means no more than that the clauses in question are defining the parties' primary obligations. In Thornbridge v Barclays Bank plc [2015] EWHC 3430 (QB) the claimant bought a financial product from the bank. He claimed that the bank was in breach of advisory and information duties in failing to advise the purchase of a suitable product; and that it also failed to take care to ensure that the information was not misstated. This, then, was a case in which the primary obligations owed by the bank to the purchaser were in issue. There was an additional claim for breach of statutory duty under the Financial Services and Markets Act 2000. Judge Moulder rejected that case, but then went on to consider a clause which stated that the buyer was not relying on any communication "as investment advice or as a recommendation to enter into" the transaction. It was not a case of a clause stating that there had been no reliance on a representation. That is why Judge Moulder said at [105] that the first step was to consider whether the terms (including the impugned term) "defined the basis on which the parties were transacting business". In other words she considered the clause in the context of defining the parties' primary rights and obligations. It was no part of the bank's obligation to give advice. Whether she was right or wrong in her ultimate conclusion does not arise in this appeal. But in my judgment it is clear that she was embarking on an entirely different exercise from the one that confronts us.

45.
In other cases the terms of the contract might qualify a representation that might otherwise have been made. In IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep 264 Toulson J gave two contrasting examples (also referred to by Christopher Clarke J in Raiffeisen Zentralbank Osterreich AG v The Royal Bank of Scotland plc [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123 at [292] and [293]):

"[292] He gave the example of the seller of a car who says to a buyer "I have serviced the car since it was new, it has had only one owner and the clock reading is accurate". Such statements would be representations and would remain so even if the seller had added the words "but those statements are not statements on which you can rely".

[293] By contrast, if the seller of the car said “The clock reading is 20,000 miles, but I have no knowledge whether the reading is true or false” the position would be different because the qualifying words could not fairly be regarded as an attempt to exclude liability for a false representation arising from the first half of the sentence.”

46.
The interplay between different contract clauses in William Sindall plc v Cambridgeshire County Council [1994] 1 WLR 1016 is another example of a qualified representation.

47.
It is now firmly established at this level in the judicial hierarchy that parties can bind themselves by contract to accept a particular state of affairs even if they know that state of affairs to be untrue. This is a particular form of estoppel which has been given the label “contractual estoppel”. Unlike most forms of estoppel it requires no proof of reliance other than entry into the contract itself. Thus as a matter of contract parties can bind themselves at common law to a fictional state of affairs in which no representations have been made or, if made, have not been relied on. Aikens LJ put the point thus in Springwell Navigation Corp v JP Morgan Chase Bank [2010] EWCA Civ 1221; [2010] 2 CLC 705 at [143]:

“If A and B enter into a contract then, unless there is some principle of law or statute to the contrary, they are entitled to agree what they like. Unless Lowe v Lombank is authority to the contrary, there is no legal principle that states that parties cannot agree to assume that a certain state of affairs is the case at the time the contract is concluded or has been so in the past, even if that is not the case, so that the contract is made upon the basis that the present or past facts are as stated and agreed by the parties.”

48.
He concluded on this point at [144]:

“So, in principle and always depending on the precise construction of the contractual wording, I would say that A and B can agree that A has made no precontract representations to B about the quality or nature of a financial instrument that A is selling to B.”

49.
However, as Aikens LJ recognised at [143], the position at common law is not the end of the inquiry. There remains for consideration whether there is a “statute to the contrary”. Whether section 3 of the 1967 is such a statute is a question, not of the interpretation of the contract, but of the interpretation of the statute. The fact that clause 5.8 of the lease operates as a contractual estoppel does not prevent consideration of this question; not least because section 3 is expressly directed at contract terms. In Thornbridge Judge Moulder said:

“[111] In my view recent authorities have been very clear that parties may agree the basis on which they are entering into a relationship. The effect of such a clause is that the party is contractually estopped from denying to the contrary. This is so even where for example parties agree that one party has not made any pre-contract representations about a particular matter and both parties knew that such representations have in fact been made…. Thus I reject the submission that the test is whether the clause “rewrites history”. Nor does anything turn, in my view, on the fact that the confirmation was not received back for some months after the deal was entered into. It was signed by the claimant and returned to Barclays and this is the basis on which the parties agreed to enter into the relationship.

[112] It follows from this that no question of reasonableness arises…”

50.
I do not agree with this part of her judgment. In my judgment it conflates two separate questions: (a) is there an estoppel which is valid as a matter of contract; and (b) if there is, does that estoppel have effect to exclude a liability for misrepresentation which would otherwise have arisen? As Aikens LJ recognised in Springwell, the inquiry does not stop with a finding that there is a contractual estoppel. That is why at [181] and [182] he considered the various clauses, parts of which defined the primary obligations of the parties (which were not subject to the test of reasonableness); and parts of which purported to exclude liability for misrepresentations by means of a non-reliance clause (which were subject to that test).

51.
Section 3 of the 1967 Act must be interpreted so as to give effect to its evident policy. That policy, in my judgment, is to prevent contracting parties from escaping from liability for misrepresentation unless it is reasonable for them to do so. How they seek to avoid that liability is subsidiary. In Cremdean Properties v Nash [1977] 2 EGLR 80, it was argued that a term in a pre-contractual notice nullified the effect of any representation. Bridge LJ held that it did not have that effect but went on to say:

“But I would go further and say that if the ingenuity of a draftsman could devise language which would have that effect, I am extremely doubtful whether the court would allow it to operate so as to defeat section 3. Supposing the vendor included a clause which the purchaser was required to, and did, agree to in some such terms as "notwithstanding any statement of fact included in these particulars the vendor shall be conclusively deemed to have made no representation within the meaning of the Misrepresentation Act 1967," I should have thought that that was only a form of words the intended and actual effect of which was to exclude or restrict liability, and I should not have thought that the courts would have been ready to allow such ingenuity in forms of language to defeat the plain purpose at which section 3 is aimed.”

52.
This approach is reflected in other cases that have considered the effect of section 3, which were reviewed by Christopher Clarke J in Raiffeisen Zentralbank. In Government of Zanzibar v British Aerospace (Lancaster House) Ltd [2000] 1 WLR 2333 the contract included a clause which stated:

“The parties further agree that neither party has placed any reliance whatsoever on any representations agreements statements or understandings whether oral or in writing made prior to the date of this contract other than those expressly incorporated or recited in this contract.”

53.
Judge Raymond Jack QC held that it fell within section 3. He said:

“A term which negates a reliance which in fact existed is a term which excludes a liability which the representor would otherwise be subject to by reason of the misrepresentation. If that were wrong, it would mean that section 3 could always be defeated by including an appropriate non-reliance clause in the contract, however unreasonable that might be.”

54.
We were pressed with the decision of this court in Watford Electronics Ltd v Sanderson CFL Ltd [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696. The contract in that case contained a clause

(clause 7.3) which limited liability for indirect losses. It also contained an entire agreement clause (clause 14) that stated:

"… no statement or representations made by either party have been relied upon by the other in agreeing to enter into the Contract."

55.
The trial judge held that there had in fact been a misrepresentation that induced the contract, and that the clause in question was in substance a clause excluding a liability that had arisen. Chadwick LJ said that he had difficulty in following that reasoning. He started his consideration of the clause by stating that it could amount to an evidential estoppel if the representor could show that he himself had relied on the acknowledgement of non-reliance. That, he said, might present insuperable difficulties. He continued at [41]:

"The importance of the entire agreement clause in the present context—and, in particular, the importance of the acknowledgement of non-reliance which constitutes the second part of that clause—is that the first sentence in cl 7.3 (or cl 10.6, as the case may be) has to be construed on the basis that the parties intend that their whole agreement is to be contained or incorporated in the document which they have signed and on the basis that neither party has relied on any pre-contract representation when signing that document. On that basis, there is no reason why the parties should have intended, by the words which they have used in the first sentence of the limit of liability clause, to exclude liability for negligent pre-contract misrepresentation. Liability in damages under the 1967 Act can arise only where the party who has suffered the damage has relied upon the representation. Where both parties to the contract have acknowledged, in the document itself, that they have not relied upon any pre-contract representation, it would be bizarre (unless compelled to do so by the words which they have used) to attribute to them an intention to exclude a liability which they must have thought could never arise."

56.
What is critical to an understanding of this part of the judgement is that Chadwick LJ was not considering whether the non-reliance clause (clause 14) was or was not an exclusion clause. What he was considering was the construction of the completely different clause in the contract (clause 7.3) which limited liability for indirect loss arising out of negligence or otherwise. The question was whether that clause was intended to capture liability for pre-contractual misrepresentation. It was in that context that he held it was bizarre to attribute to them in clause 7.3 an intention to exclude a liability which they must have thought could never arise. He was not considering whether section 3 applied to clause 14.

57.
In addition it seems to me to be clear that Chadwick LJ was approaching the question whether section 3 applied from the perspective of construing the contract. As I have said, in a case in which contractual terms do no more than define the parties' substantive rights and obligations that is the correct approach. But once that has been done, I find it difficult to see how the intention of the parties bears on the question whether a particular term (which does not define primary rights or obligations) would have the effect that section 3 proscribes. It may be that Chadwick LJ's approach to that question was coloured by his analysis of the clause as giving rise to a potential evidential estoppel rather than a contractual estoppel.

58.
In Raiffeisen Zentralbank Christopher Clarke J said at [286]:

“I cannot perceive any relevant distinction between clause 14 in Watford Electronics and clause [C] in Government of Zanzibar. It seems to me that, if there had in fact been reliance on the representations pleaded in Watford Electronics, the effect of clause 14 would have been to exclude liability as it did in Government of Zanzibar. If, therefore, the clause had been relied upon as a contractual, as opposed to an evidential estoppel, it would have fallen within section 3.”

59.
I agree. Christopher Clarke J went on to say:

“[307] In that example there has been a clear statement of fact, on a matter said to be within the representor's personal knowledge, which was in fact intended to induce the contract, upon which the purchaser in fact relied, which is false. If section 3 has no application in respect of a contractual estoppel there is no further control mechanism on its operation, which does not require detrimental reliance. The seller (and any other similar seller) may, subject to any applicable consumer protection laws, make non-fraudulent misrepresentations of that type with impunity.

[308] In such a situation section 3 is, as it seems to me, applicable because, on those facts, there has been what the person to whom the statement was made would reasonably understand to be a representation, which was intended to be and was in fact relied on. The clause seeks to avoid liability for what, absent the clause, would be a clear liability in misrepresentation. The situation might be different in the unlikely scenario that before he contracts the buyer sees the clause and, eyes wide open, agrees that he is not relying on what he may have been told.”

60.
He concluded at [310]:

“As has already been said, the essential question is whether the clause in question goes to whether the alleged representation was made (or, I would add, was intended to be understood and acted on as a representation), or whether it excludes or restricts liability in respect of representations made, intended to be acted on and in fact acted on; and that question is one of substance not form.”

61.
Again, I agree.

62.
I do not consider that the decision of this court in Springwell casts any doubt on this analysis. Having decided that the clauses in question did create a contractual estoppel, Aikens LJ went on to say at [182]:

“In relation to the key part of Section 6(c) of the GKO LN terms, viz. ‘… the Holder has not relied on and acknowledges that neither CMSCI nor CMIL has made any representations or warranty with respect to the advisability of purchasing this Note’, I think that the same reasoning applies. If, contrary to my conclusion, Chase had made representations to Springwell, then this clause is an attempt retrospectively to alter the character and effect of what has gone on before and so is in substance an attempt to exclude or restrict liability.”

63.
This is a clear example of a non-reliance clause being held to fall within the scope of section 3. I accept that this part of Aikens LJ’s judgment is obiter, but in my judgment it is plainly right. It was hardly a surprising conclusion for him to have reached, as he had decided the same point in the same

way when sitting at first instance in Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd [2008] EWHC 1686 (Comm), [2008] 2 Lloyd's Rep 581 at [48].

64.
In Sears v Minco plc [2016] EWHC 433 (Ch) the question of misrepresentation did arise. The contract in that case included a clause that Judge Hodge QC described as follows

"That agreement contained (in clause 5.6) Barclays's confirmation and warranty (for itself and Mr Sears) that it was acknowledging and agreeing that (1) it had relied upon its own representatives as to investment or other matters relating to Minco and its decision to subscribe for shares, and (2) the share subscription had not been made on the basis of any information or representations, including any presentation made by Minco and/or Beaufort prior to the date of the letter, and accordingly neither Beaufort nor Minco should have any liability for any other information or representations except in the case of fraud."

65.
The claimant submitted that a non-reliance clause of that kind was not automatically immune from scrutiny under section 3; and that if it was in reality an attempt to exclude or restrict liability for misrepresentations which had already occurred, then it would fall to be examined under section 3 and the reasonableness test would be applied. In other words, the existence of a contractual estoppel was not a logically prior question but must be looked at in the round with section 3. Judge Hodge QC referred to the decision of Judge Moulder in Thornbridge and in particular paragraphs [111] and [112] and said at [80]:

"... I respectfully agree with Judge Moulder's analysis and conclusions. I do not accept that the decision is one on the particular facts of the case. Judge Moulder was professing to state the effect of the recent authorities. In my judgment, as a matter of construction, the particular provisions of the subscription agreement dated 27 August 2010 are in the nature of basis clauses and not exclusion clauses. Consistently with the views of Judge Moulder, I accept Mr Lundie's submissions that the claimants are contractually estopped from asserting that they purchased shares in the 2010 share placing in reliance on the minimum dilution representation."

66.
In my judgment, Judge Hodge QC misunderstood the nature of the exercise that Judge Moulder undertook. She was concerned to define the parties' primary rights and obligations. There was no claim for misrepresentation in Thornbridge. As I have already said, the mere fact of a contractual estoppel is not in itself a complete answer to section 3; and Judge Moulder was wrong to suggest otherwise in that part of her judgment. In so far as Judge Hodge QC held that a simple non-reliance clause was immune from scrutiny under section 3, I consider that he was wrong. I have also read the compelling analysis of Leggatt LJ on this issue and I agree entirely with what he says.

67.
I would hold, therefore, that a clause which simply states (as clause 12.1 of the agreement for lease and clause 5.8 of the lease do) "that this lease has not been entered into in reliance wholly or partly on any statement or representation made by or on behalf of the landlord" is a contract term which would have the effect of excluding liability for misrepresentation; and consequently is subject to the test of reasonableness. Accordingly, in my judgment the judge in our case was right to conclude as he did. I do not consider that a conclusion to this effect should cause consternation. It will always be open to a contracting party seeking to rely on such a clause to establish that it was reasonable; and in cases involving the sale of complex financial products to sophisticated investors it may well be.

Were the clauses reasonable?

68.
That leads on to the next question: were the clauses in this case reasonable? The test of reasonableness is contained in section 11 (1) of the Unfair Contract Terms Act 1977:

"In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the Misrepresentation Act 1967 … is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made."

69.
In FoodCo LLP v Henry Boot Developments Ltd [2010] EWHC 358 (Ch) I had to consider a clause in the form of clause 12.1 of the agreement for lease in the present case. I held that such a clause was reasonable. I gave my reasons at [177]:

"i) The aspiration of certainty is a reasonable one for the parties to adopt. In most cases it will have the effect of avoiding a twelve day trial such as this one.

ii) There was no substantial imbalance of bargaining power between the parties. Each of the tenants was a commercial and substantial concern.....

iii) Each of the tenants was advised by solicitors… .

iv) The term itself was open to negotiation …

v) Perhaps most importantly, the clause expressly permitted reliance on any reply given by the Henry Boot's solicitors to the tenant's solicitors. If, therefore, something of importance had been stated in the course of negotiations upon which the intending tenant wished to rely, its solicitors had only to ask Henry Boot's solicitors for an answer to a question. That would have revealed whether Henry Boot was prepared to formalise the statement so that the tenant could rely on it or whether the tenant would have to undertake its own due diligence."

70.
That approach was expressly approved by this court in Lloyd v Browning [2013] EWCA Civ 1637, [2014] 1 P & CR 11. In the course of his judgment Davis LJ said:

"[34] There are, as I see it, other matters also strongly indicating that this condition was a reasonable and fair one to be introduced into this particular contract:

(1) First, each side had, and as they each knew, legal advisers. That was, as the judge duly found, plainly material as to the reasonableness of including this particular condition into the contract. Moreover, it was the case, as was known to all concerned, that the claimants had in addition instructed architects and planning consultants. That was a relevant factor, too.

(2) Second, the contract was one for the sale of land. It is generally well known that such contracts do indeed, as the judge put it, have a status of "formality" about them. Contracts relating to the disposition of property are designed by law to require that all the agreed terms are set out in one contractual document signed by each party.

(3) Third, this condition was not a "take it or leave it" condition of the kind sometimes imposed in small print on consumers, acting without legal advice, in consumer transactions. It was a special condition agreed by the parties' lawyers in circumstances where the parties had equal and

corresponding negotiating positions. Moreover, such condition had the general imprimatur of the Eastbourne Law Society and was, it is to be inferred, in common use. That, too, is a further factor indicating reasonableness.

(4) Fourth and I think this is a particular striking feature in the present case the condition, expressly by its terms, permitted the claimants to rely on written statements made by the defendants' solicitors in replying to pre-contract enquiries or otherwise in correspondence. Thus, if the claimants wished to rely on what had been said to them orally the means for giving legal effect to that were readily available: that is, by an appropriate written pre-contract enquiry or solicitor's letter. Such a request would reveal just what the defendant vendors were prepared formally to commit themselves to."

71.
In Hardy v Griffiths [2014] EWHC 3947 (Ch), [2015] Ch 417 Ms Amanda Tipples QC took the same approach. In each of these cases the court stressed the fact that the clause in question expressly preserved liability for misrepresentations contained in formal enquiries before contract.

72.
Applying that approach, the judge found that clause 12.1 of the agreement for lease passed the test of reasonableness. He then turned to clause 5.8 of the lease. As to that he said at [38]:

"But what of clause 5.8 of the lease? It does not follow from the reasonableness of a clause which does allow reliance on replies to inquiries that a clause which denies such reliance is necessarily unreasonable. But it does seem to me to cast serious doubt on the reasonableness of clause 5.8. The very point which was crucial in upholding the reasonableness of the provision in the FoodCo UK LLP case is absent. So the landlord can say what he likes in replies to inquiries (fraud apart), withholding his own knowledge of a serious problem and requiring the tenant to carry out his own due diligence, and then meet the tenant with a contractual estoppel. That seems to me highly unreasonable, particularly in the conveyancing world, where pre-contractual inquiries have a particular and well-recognised importance. With clause 5.8 they become a worthless, and indeed positively misleading, exercise. I do not think this is reasonable."

73.
He added at [40]:

"That was not a reasonable clause to put into the lease, because its effect would render the whole exercise of making inquiries and relying on answers thereto all but nugatory. I suspect that conveyancing practitioners would be appalled if such clauses gained wide currency and were upheld by the courts."

74.
The landlords argue that because the misrepresentation was an innocent one, and CDS was told to satisfy itself that there were no environmental problems, the judge should have held that the clause was reasonable "in so far as" it related to that misrepresentation. The premise of this argument is that the misrepresentation was an innocent one. If "innocent" means simply non-fraudulent, then that carries the case no further, because it is plain that no one can exclude liability for his own fraudulent misrepresentation. If, on the other hand, it means non-culpable or non-negligent that would have required a factual finding from the judge. Since no one from the landlords gave evidence at trial and no one attempted to explain whether (and if so how it came about that) the email from VPS was not passed on to CDS, the factual premise on which the argument is based is unsound. The landlords also argue that all the factors that I considered in FoodCo (apart from the fifth) were present in this case.

All the terms of the lease were capable of being negotiated between solicitors. CDS could and should have negotiated a “carve out” to clause 5.8 in the same terms as the “carve-out” to clause 12.1 of the agreement for lease if they were concerned about being able to rely on replies to enquiries before contract. The parties were both substantial commercial concerns, represented by competent solicitors. The courts have stressed that in those circumstances a court should be very wary of saying contract terms negotiated by commercial parties are unreasonable: see Watford Electronics at [55].

75.
Whether a clause passes the test of reasonableness is an evaluative judgment for the trial judge. An appeal court should be slow to interfere: George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 2 AC 803. The judge recognised the four factors on which the landlords relied (and set them out at [34]). He directed himself by reference to the three cases to which I have referred. It cannot be said either that he misdirected himself in law, or that he took into account irrelevant factors or ignored relevant ones. Although there is some force in the landlords’ argument, I do not consider that there is any ground in this case for interfering with the judge’s overall assessment of the application of the test of reasonableness. Indeed, in my judgment, he was right to stress the importance of pre-contract enquiries in the field of conveyancing; and right in the conclusion to which he came. As the judge said, if clause 5.8 governs the landlords’ liability the important function of replies to enquiries before contract becomes worthless. Although there might be a case where, on exceptional facts, a clause which precludes reliance on replies to enquiries before contract might be held to satisfy the test of reasonableness even where those replies have in fact been relied on, I find it very hard to imagine what those facts might be. Of course, the existence of the non-reliance clause may itself be evidence of non-reliance; as was indeed the case in one of the claims that I considered in FoodCo: see FoodCo at [116] to [118].

76.
There is one further point which the judge did not expressly rely on, but which Mr Johnson QC drew to our attention. As the judge found, the supply of the S2 report which appeared to give Bays 1-4 a clean bill of health was itself a misrepresentation, although not contained in replies to enquiries before contract. I consider that Mr Johnson was right to say that where there has in fact already been a misrepresentation it is all the more important for an intending buyer or tenant to be able to rely on the more formal answers to enquiries before contract.

77.
I would uphold the judge’s decision on this point.

Did the trustees limit their liability under section 2?

78.
The last question is whether the fact that the landlords executed the lease “in their capacity as trustees of the Barnsley Unit Trust and not otherwise” limited their liability for damages under section 2. It is not in dispute that a person who enters into a contract in the capacity of trustee may limit his contractual liability to the extent of the trust fund, and that he will incur no personal liability in excess of the fund, provided that suitable words are used. The principle is stated in Muir v City of Glasgow Bank (1879) 4 App Cas 337, 355:

“… whether, in any particular case, the contract of an executor or trustee is one which binds himself personally, or is to be satisfied only out of the estate of which he is the representative, is, as it seems to me, a question of construction, to be decided with reference to all the circumstances of the case; the nature of the contract; the subject-matter on which it is to operate, and the capacity and duty of

the parties to make the contract in the one form or in the other. I know of no reason why an executor, either under English or Scotch law, entering into a contract for payment of money with a person who is free to make the contract in any form he pleases, should not stipulate by apt words that he will make the payment, not personally, but out of the assets of the testator."

79.
This principle has been recently restated by the Privy Council in Investec Trust (Guernsey) Ltd at [59]:

"(iii) The legal personality of a trustee is unitary. Although a trustee has duties specific to his status as such, when it comes to the consequences English law does not distinguish between his personal and his fiduciary capacity. It follows that the trustee assumes those liabilities personally and without limit, thus engaging not only the trust assets but his personal estate. …

(iv) This liability may be limited by contract, but the mere fact of contracting expressly as trustee is not enough to limit it. It merely makes explicit the knowledge of the trustee's capacity which Lord Penzance regarded as insufficient: see Lumsden v Buchanan (1865) 3 M (HL) 89. There must be words negativing the personal liability which is an ordinary incident of trusteeship. In Gordon v Campbell (1842) 1 Bell's App 428 and Muir v City of Glasgow Bank itself, it was held that the words "as trustee only" were enough."

80.
It is not in dispute that the form of words used in this case was effective for the purpose of limiting the landlords' personal liability in contract. In so far as that contract term takes effect as an exclusion clause, the judge was satisfied that it was reasonable. There is no appeal against that. The question is whether those words also serve to limit the landlords' liability for damages under section 2. The judge dealt with that question at [56]:

"The clauses in issue do not purport to limit liability for pre-contract misrepresentation. They are not "no-reliance" clauses or the like. They simply say that, when the trustees enter into the Lease or the Agreement for a Lease, they contract as trustees and not otherwise. I do not understand the legal mechanism by which it is alleged that this covers pre-contract representations. The Claimants argue that no cause of action in misrepresentation is complete until the relevant contract is entered into between representee and representor. This may be true, but it does not help as to the extent of the stipulated limitation. If the misrepresentation was made by or on behalf of the trustees, then it has to be possible, if the Claimants are to succeed, to construe the later contractual limitation clause as extending to that pre-contractual misrepresentation. I do not think that this is the true construction of the relevant clauses."

81.
At [57] he said:

"The clauses simply define the capacity in which the trustees contract. They say nothing about connected non-contractual claims. They could easily have done so."

82.
It is agreed that there is no relevant authority on the question whether a form of words such as was used in the present case limits a trustee's liability in tort or for damages payable by statute. English law does not recognise a limitation of capacity on the part of a trustee as Investec makes clear. The only way in which a trustee may limit his liability to third parties is by contract. As Muir holds, whether a trustee has effectively done so is a question of construction of the contract. The description

of the capacity in which the landlords executed the lease does not expressly state that their liability will be limited to the assets of the Barnsley Unit Trust. So the fact that it has that effect is a matter of necessary implication from the express words used. Is it a necessary implication from the words used that the landlords were limiting their liability under section 2?

83.
Mr Steinfeld points out that the statutory liability only arises because the landlords have entered into a contract, and that liability is imposed only on a contracting party. The liability therefore arises entirely out of the contractual relationship. In order to discover who is liable under section 2 it is necessary to examine the contract to see who are the parties to it. When that is done it will be seen that the only relevant parties are the trustees acting in that capacity only. The words in the lease are intended to limit the landlords' liability arising as a result of entering into the contract. That liability includes liability under section 2. Moreover, if the impugned answer had been given as a warranty contained the contract itself, there can be no doubt but that the landlords' liability would have been limited to the trust assets. So the wording in the lease should be regarded as extending to that statutory liability. In addition the principle underlying the ability of trustees to limit their liability depends on their having made clear to their counter-party that they are entering into a transaction as trustees only, thus signalling that they are only willing to accept liability up to the extent of the trust assets. Mr Steinfeld gave instances of obligations imposed by statute on contracting parties (such as repairing obligations imposed on landlords of dwelling houses). But those obligations take effect as additional contract terms. They do not operate outside the contract.

84.
At the heart of Mr Steinfeld's submissions on this question was the proposition that liability for damages under section 2 is an incident of contractual liability. I do not agree. It is trite law that parties in a contractual relationship may owe parallel duties in tort. But those tortious duties are separate from contractual obligations. They are duties imposed by law as opposed to contractual obligations voluntarily undertaken. The default position, as appears from Investec at [59] (iii), is that English law does not recognise a trustee as having limited capacity or liability vis a vis a third party. That must also be true of a liability for damages payable by statute. The default position, therefore, is that a trustee is personally liable for damages for misrepresentation, which are not damages recoverable in contract. That liability may, no doubt, be qualified or limited by contract. As a general proposition, where a contract seeks to remove from one party a remedy to which he would be entitled at common law, it must do so clearly. To quote but one example, in HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6, [2003] 2 Lloyd's Rep 61 Lord Bingham said:

"The courts should not ordinarily infer that a contracting party has given up rights which the law confers upon him to an extent greater than the contract terms indicate he has chosen to do; and if the contract terms can take legal and practical effect without denying him the rights he would ordinarily enjoy if the other party is negligent, they will be read as not denying him those rights unless they are so expressed as to make clear that they do."

85.
I do not consider that the form of words does so in this case. There may well be reasons why a contracting party, although limiting his liability in contract, is willing to take the risk of liability under section 2. First, the measure of damages is different as between misrepresentation and breach of warranty. Second, at least in the case of a lease granted by deed, the limitation period is much shorter in the case of a claim under section 2 than it is in a case of breach of warranty. Third, a defendant to a claim in misrepresentation has the potential defence that he believed, on reasonable grounds, that the

representation was true; whereas no such defence is available in the case of a breach of warranty. Fourth, the obligations undertaken by the landlords under the lease were forward-looking obligations whose contractual force only began when the lease was granted; and which would govern the parties' contractual relationship for the term of the lease. On the other hand, a liability for damages for misrepresentation is a backward-looking liability; albeit that the cause of action crystallised on entry into the lease. There is no reason to suppose that a limitation applicable to one time period is also applicable to a different anterior time period. It is not, in my judgment, a necessary implication from the form of words used that the trustees were doing more than limiting their liability in contract.

86.
The contractual position is discussed in Lewin on Trusts (19th ed) at para 21-012. As far as tort is concerned Lewin states at para 21-018:

"A trustee may, like any other legal owner of property, become personally liable in tort in respect of acts or omissions of himself or his employees or agents in connection with the administration of trust property. As between the trustee and the claimant, the trustee's personal liability will in no way depend upon whether or not the trustee was acting properly in accordance with the trust, nor, it is thought, will his personal liability be in any way limited to the trust assets available for the purpose of meeting the claim."

87.
As Mr Steinfeld said more than once damages payable under section 2 are not damages payable in tort. They are damages payable by statute. But I do not see any relevant distinction between the two. The point is that neither is payable under the contract. In my judgment what is said in Lewin para 21-018 is the position in this case.

Result

88.
I would dismiss the appeal.

Lord Justice Leggatt:

89.
I agree. The question whether or when section 3 of the Misrepresentation Act 1967 applies to a 'non-reliance' clause (or other clause said to create to a 'contractual estoppel') has been the subject of uncertainty and I think confusion. For that reason, I wish to add some further remarks specifically endorsing what Lewison LJ has said on this issue.

90.
It has been suggested that, in applying section 3, a distinction should be drawn between an exclusion clause and a so-called 'basis clause' which does not exclude liability but, by defining the basis on which the parties are contracting, prevents liability from arising in the first place. This was the argument made by Mr Steinfeld QC on behalf of the landlords on this appeal. He submitted that clause 5.8 of the lease is a 'basis clause' to which section 3 of the 1967 Act has no application.

91.
It is worth examining exactly what is meant in this context by describing a clause as a 'basis clause'. The term reflects language used in the cases which have recognised the principle of 'contractual estoppel'. The first of these was Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd [2006] EWCA Civ 386, [2006] 1 CLC 582, where Moore-Bick LJ said at [56]:

“There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel ...”

92.
The use of the word ‘basis’ in stating this principle has been repeated in subsequent cases. For example, in Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd [2008] EWHC 1686 (Comm), [2008] 2 Lloyd’s Rep 581 at [36], having found that the parties had agreed as a term of their contract that no pre-contractual representation had been made, Aikens J went on to say that, “more importantly”, the parties had agreed that “this state of affairs is to form the basis of the transaction”. The same formula was used in Raiffeisen Zentralbank Osterreich AG v The Royal Bank of Scotland plc [2010] EWHC 1392 (Comm), [2011] 1 Lloyd’s Rep 123, where Christopher Clarke J said at [230]:

“Parties to a contract may agree that a particular state of affairs is to be the basis upon which they are contracting, regardless of whether or not that state of affairs is true. A line of authority establishes that such an agreement may give rise to a contractual estoppel, precluding the assertion of facts inconsistent with those that have been agreed to form the basis of the contract.”

93.
Again, in Springwell Navigation Corp v JP Morgan Chase Bank [2010] EWCA Civ 1221, [2010] 2 CLC 705, Aikens LJ said at [143] that:

“there is no legal principle that states that parties cannot agree to assume that a certain state of affairs is the case at the time the contract is concluded or has been so in the past, even if that is not the case, so that the contract is made upon the basis that the present or past facts are as stated and agreed by the parties.”

94.
Like Moore-Bick LJ in Peekay at [57], I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear. But I question whether a clause, such as clause 5.8 of the lease in this case, which says simply that A “acknowledges” that it has not entered into the contract in reliance on any representation made by B, clearly expresses such an intention. It seems to me that such wording is more naturally understood as stating a fact which may or may not be true. That, indeed, is how a similarly worded clause was understood by the Court of Appeal in Watford Electronics Ltd v Sanderson CFL Ltd [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696. If what the parties wish to agree is that A will not assert in any future dispute that it relied on a representation made by B even if A did in fact rely on such a representation, then it seems to me that this is what the clause ought to say. However, a different view was taken by the Court of Appeal in Springwell at [170]. No doubt for that reason the tenant did not dispute in the present case that clause 5.8 of the lease has that meaning, and I shall therefore assume that it does.

95.
It is important, nonetheless, not to be misled by the use of the word ‘basis’. To say that a clause giving rise to a contractual estoppel establishes the ‘basis’ of the contract could be taken to suggest that the clause is of fundamental or foundational importance to the parties’ bargain. That in turn might

encourage the thought that a ‘basis’ clause is entitled to particular respect in order not to interfere with freedom of contract and is different in nature from a common or garden exclusion clause. Such a line of thought, however, is fallacious, as it turns on an ambiguity in the word ‘basis’. There is nothing in the terms of the lease in this case, for example, to suggest that clause 5.8 is intended to have a special foundational or fundamental importance as a term of the parties’ contract. The same is true of other clauses which have been considered in the case law to give rise to a contractual estoppel. Those clauses have no more been agreed to form the basis of the contract in this sense than any other term of the contract. The statements in Peekay and subsequent cases that the parties have agreed that a particular state of affairs is to form the ‘basis’ on which they are contracting use the word in a different sense to mean an assumption that is agreed for the purpose of the transaction. Such statements are just another way of saying that the parties have agreed to assume that the relevant state of affairs is true, whether or not it is in fact true. It would be conducive to clarity if the use of the expression ‘basis clause’ were to be avoided.

96.
What then of the suggestion that a distinction should be drawn between a contract term which excludes liability and one which defines the parties’ obligations in a way that prevents liability from arising? I agree with Lewison LJ that the relevance of this distinction is limited to a situation in which there is an issue about the extent of the primary obligations undertaken by a contracting party. Where a party relies on a term of its contract to argue that it has no liability under the contract to the other party, an issue can arise as to whether the term excludes liability for breach of the contract or merely shows that no relevant contractual obligation has been undertaken. This is a question of construction of the contract in question.

97.
The position is different where a contracting party relies on a term of the contract to argue that, because the term precludes the assertion of facts inconsistent with those that have been agreed, it has no liability to the other party in tort. As Lord Goff said in Henderson v Merrett Syndicates Ltd [1995] 2 AC 145, 193, “the law of tort is the general law, out of which the parties can, if they wish, contract.” (The parties’ wishes in this regard are of course constrained by those rules, such as the rules contained in UCTA, which limit their freedom to exclude or restrict tortious liability.) Where a duty is imposed by law and not because it is a term of a contract agreed between the parties, the distinction between a contract term which excludes liability and one which prevents liability from arising by giving rise to a contractual estoppel is a distinction without a difference. In such circumstances it cannot be said that the contract term is merely creating and defining the extent of the parties’ obligations. The term is seeking to exclude a liability which would otherwise be there.

98.
Section 2(1) of the Misrepresentation Act 1967 creates a statutory tort, which filled a perceived gap in the common law by imposing a liability in damages for loss caused by a misrepresentation without the need to show fraud. The liability is confined to misrepresentations which have induced the representee to enter into a contract with the representor, as a result of which the representee has suffered loss. As Lewison LJ has explained in addressing Mr Steinfeld’s submissions on behalf of the landlords on the trustee liability issue, this does not mean that the liability created by section 2(1) depends on what the parties have agreed in the contract. It does not. The liability arises by operation of law independently of what the parties have agreed. If, as in the present case, all the elements necessary to give rise to liability in damages under section 2(1) have in fact been proved but a term of the contract prevents the claim from succeeding because it contains an agreement that no reliance

has been placed on the representation, the term is excluding liability which would exist in the absence of the term.

99.
Even if, by giving the language of section 3 of the Act a strained interpretation, a distinction could be drawn between a contract term which would exclude liability and a term which would prevent liability from arising, there is no reason to draw such a formalistic distinction and good reason not to interpret section 3 in a way which omits the latter type of term from its scope. The result of doing so would be that a lawyer drafting boilerplate provisions could avoid the application of section 3 purely by the choice of words in which the clause is phrased. A clause stating that a party will have no liability for any representation made or on which the other party has relied on any view falls within section 3 and is subject to the requirement of reasonableness. But on this interpretation, if instead the clause were worded to say that A agrees not to assert that B has made or that A has relied on any representation, section 3 would not apply. No rational legislator could have intended that the need for a contract term to satisfy a test of reasonableness could be avoided simply by felicity in drafting the contract term. This was the point made in Cremdean Properties v Nash [1977] 2 EGLR 80 and Government of Zanzibar v British Aerospace (Lancaster House) Ltd [2000] 1 WLR 2333 in the passages quoted by Lewison LJ at paragraphs 51 and 52 above. In my view, it is compelling.

100.
Mr Steinfeld submitted that, in determining whether clause 5.8 of the lease falls within section 3, it is relevant that the clause was contained in a contract made between sophisticated commercial parties who should be taken to have understood the effect of what they were agreeing and allowed to agree what they choose. In support of this contention, he relied on dicta of Christopher Clarke J in the Raiffeisen case at [314]-[315] contrasting, on the one hand, an agreement between "sophisticated commercial parties ..., in terms of which they are both aware, to regulate their future relationship by prescribing the basis on which they will be dealing with each other and what representations they are or are not making" with, on the other hand, an agreement made with "the man in the street" after representing that a car he is buying is perfect that "the basis of your contract is that no representations have been made or relied on". Christopher Clarke J suggested that an agreement of the latter kind would be an attempt to exclude or restrict liability caught by section 3 but that an agreement of the former kind would not. Mr Steinfeld submitted that the present case falls squarely within the former category.

101.
It should be noted that the hypothetical examples contrasted in the Raiffeisen case combine two separate distinctions. The agreement between "sophisticated commercial parties" is an agreement containing terms intended to "regulate their future relationship by prescribing the basis on which they will be dealing with each other" (emphasis added), whereas the agreement made with "the man in the street" looks backwards to what has already happened. But if – as Christopher Clarke J suggested and I agree – in a case of the second kind a clause which retrospectively prevents a party from asserting that a representation has been made or relied on is an attempt to exclude or restrict liability, that cannot be because the contracting party is a "man in the street". The purported effect of a contract term does not depend on how sophisticated the parties to the contract are, such that an identically worded clause can be a term which purports to exclude liability if the party agreeing to it is the "man in the street" but not a term which purports to exclude liability if the party agreeing to it is a "sophisticated commercial party".

102.

The irrelevance of that feature of the example is confirmed by the decision of the Court of Appeal in Springwell. In that case the purchaser of a complex investment product was found to be a sophisticated investor: see [112]. Nevertheless, Aikens LJ applied the “man in the street” part of Christopher Clarke J’s analysis and held that clauses which provided that no representations were made and that the purchaser had not relied on any representations were in each case “an attempt to alter the character and effect of what has gone before” and thus “in substance an attempt to exclude or restrict liability”: see [181]-[182].

103.
Quite apart from authority, to read into section 3 an implied limitation which would make its application depend on who the parties to the contract are is not only unwarranted by the statutory language but inconsistent with the scheme of the Unfair Contract Terms Act. That Act makes it clear which of its provisions are limited in such a way and which are not. Thus, sections 2 to 7 of UCTA apply only to “business liability” – which refers principally to liability for acts done by a person in the course of a business: see section 1(3). In addition, when it was originally enacted certain provisions of UCTA applied only to attempts to exclude or restrict liability as against a person “dealing as a consumer”: see sections 3, 4, 6(2) and 7(2). (These provisions have since been deleted, as consumer contracts are now regulated by the Consumer Rights Act 2015.) By contrast, section 3 of the Misrepresentation Act 1967 – which was substituted by section 8 of UCTA – is not limited in any such way. A deliberate decision was plainly taken that it should apply to any contract, irrespective of whether the party to whom a misrepresentation was made was a consumer or a business enterprise (small, medium or large). Indeed, section 3 now applies only to contracts which are not consumer contracts: see section 3(2), which exempts such contracts from section 3 as they are subject to the fairness requirement imposed by section 62 of the Consumer Rights Act 2015.

104.
The decision to make section 3 applicable to all contracts induced by misrepresentation, irrespective of the nature and subject matter of the contract and the identity of the contracting parties, is readily understandable. The importance which English law attaches to the freedom of parties to contract on whatever terms they choose depends crucially on the assumption that their consent to the terms of the contract has been obtained fairly. That is not the case where one party’s consent has been induced by a misrepresentation made by the other contracting party. Misrepresentation is a paradigm “vitiating factor” which undermines the validity of a contract. This does not mean that a party cannot choose to give up the right to complain that its consent to the terms of the contract was obtained by misrepresentation. But in so far as a contract term is said to have removed that right, a control mechanism is needed to ensure that this term was a fair and reasonable one to include. That, at all events, is the policy which Parliament has thought it right to adopt. It is the duty of the courts to uphold and not to subvert that policy choice.

105.
This is not to doubt that the level of sophistication of a contracting party is relevant in determining whether a term is effective to prevent the party from obtaining a remedy for misrepresentation. But its relevance is to the question whether, having regard to the circumstances which were or ought reasonably to have been known to or in the contemplation of the parties when the contract was made, it was fair and reasonable to exclude liability. It is not a ground for bypassing that question.

106.
Returning to the two hypothetical examples contrasted by Christopher Clarke J in the Raiffeisen case, the second point of distinction was between an agreement that seeks to regulate the parties’ future

relationship and one that is retrospective in its purported effect. In the Raiffeisen case itself the relevant provisions which were held to give rise to a contractual estoppel were contained in a confidentiality agreement which set out the terms on which information was provided by the defendant to the claimant in connection with a prospective financial transaction, and in an “important notice” included in a memorandum which was part of the information provided by the defendant. The relevant provisions were therefore contract terms which sought to regulate the parties’ future relationship. In a case of this kind the existence of a contract term which says, for example, that “no representation is made” may affect whether, as a matter of fact, the elements of a claim for misrepresentation are established. Thus, there may be a question as to whether, in the light of the term, a particular communication would reasonably be understood to be making a representation of fact. The existence of such a term may also be relevant in determining whether the party to whom the communication was addressed did in fact rely on any such representation.

107.
If, however, in any such case, on analysis of the facts the conclusion reached is that the ingredients of a claim for misrepresentation are made out, the defendant may at that stage seek to defeat the claim by relying on such a term not as part of the factual investigation but for its contractual effect in allegedly creating a contractual estoppel. As discussed, the nature of such a defence is that the claimant is precluded from asserting that, for example, a representation was made by the defendant because the claimant has agreed that nothing said by the defendant was to be regarded as a representation. If on the facts it is shown that a representation was made and that the defendant would be liable in the absence of the term, then the effect of the term, if valid, is to exclude liability for misrepresentation. It therefore falls within section 3. It can make no difference in that regard whether the representation was made and relied on before or after the contract containing the term was made.

108.
It follows that, in so far as the relevant provisions in the Raiffeisen case were said to give rise to a contractual estoppel, Christopher Clarke J was in my view wrong to suggest at [316]-[317] that they did not fall within section 3. His opinion on that point was, however, obiter as he had already found that the representations alleged by the claimant had not been made. (He also went on to hold that the relevant provisions satisfied the requirement of reasonableness in any event.)

109.
The position is simpler in a case where the contract term is retrospective in its intended effect. That will be so whenever, as in the present case, the contract containing the relevant term and the contract made in reliance on a misrepresentation are the same contract. In such a case there is only one stage to the analysis. Ex hypothesi the term did not exist as a contract term when the communication alleged to constitute a representation was made and when the claimant relied on it in deciding to enter into the contract. The term is therefore not relevant to the question whether the facts necessary to establish liability for misrepresentation have been proved. In this category of case the only relevance of the contract term is to found a defence that the defendant is not liable for misrepresentation because the claimant has agreed not to assert that there was a representation or has agreed not to assert that it relied on the representation, even when there was and it did. The term is thus one which would exclude liability and falls within section 3.

110.
No claim for misrepresentation at common law has been made in this case and thus no question arises of the kind raised, for example, in Thornbridge v Barclays Bank plc [2015] EWHC 3430 (QB) as to

whether a contract term which seeks to prevent a party from asserting that it received advice or was owed a duty of care in connection with the provision of information or advice by the other party comes within section 2 of UCTA. It may be noted, however, that authority at the highest level indicates that the correct approach in such a case is likewise first to determine whether in the absence of the contract term there would be a tortious liability arising out of an assumption of responsibility and concomitant reliance, and "then to inquire whether or not that liability is excluded by the contract because the latter is inconsistent with it": Henderson v Merrett Syndicates Ltd [1995] 2 AC 145, 193; and see also Smith v Eric S Bush [1990] 1 AC 831.

111.
For the reasons I have given, as well as those given by Lewison LJ, I would hold that whenever a contracting party relies on the principle of contractual estoppel to argue that, by reason of a contract term, the other party to the contract is prevented from asserting a fact which is necessary to establish liability for a pre-contractual misrepresentation, the term falls within section 3 of the Misrepresentation Act 1967. Such a term is therefore of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11 of UCTA.

112.
For the reasons given by Lewison LJ, I would also uphold the judge's findings that clause 5.8 of the lease did not satisfy the requirement of reasonableness in this case and that the landlords did not limit their liability for the misrepresentation that was made on their behalf. I too would therefore dismiss the appeal.

Sir Colin Rimer:

113.
I agree with both judgments.