

## Group Briefing

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# No Duty of Care Owed to Buyer in Respect of Error in Property Sale Brochure

#### KEY CONTACTS

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The recent Supreme Court case of *David Walsh v Jones Lang Lasalle Limited* will be of interest to property investors, agents and lawyers as it reaffirms the principle of “let the buyer beware” in respect of errors and disclaimers in property sale brochures.

The Supreme Court ruled that Jones Lang Lasalle, a property agent, did not owe a duty of care to a buyer, so was not liable to Mr. Walsh in respect of errors in the sale brochure.

#### BACKGROUND

Jones Lang Lasalle (“JLL”) produced a sale brochure for 77 Upper Gardiner Street, Dublin 1 which contained the following disclaimer:

“Whilst every care has been taken in the preparation of these particulars, and they are believed to be correct, they are not warranted and intending buyers/lessees should satisfy themselves as to the correctness of the information given.”

The brochure described the area of the first floor as 972m<sup>2</sup> (10,463 square feet) but the true area was 8,573.5 square feet. Mr. Walsh did not check the measurement and

purchased the property assuming the brochure was correct. The error in the measurement came to light when Mr. Walsh came to let the property after the sale closed.

While JLL admitted that there was an error in the brochure, the legal issue to be determined was whether, in light of the disclaimer, JLL was liable to Mr. Walsh in respect of that error.

#### HIGH COURT DECISION

The High Court concluded that JLL was liable and that the disclaimer did not operate to protect them. Mr. Walsh was awarded compensation of €350,000 which was the amount by which it could be said that Mr. Walsh overpaid for the property in reliance on the mistaken floor area. JLL appealed to the Supreme Court.

#### SUPREME COURT DECISION

The Supreme Court overturned the High Court’s decision and found that the High Court was wrong in finding a duty of care was owed by JLL to Mr. Walsh. The Supreme Court analysed the relevant case law in detail and concluded that the disclaimer was important evidence in establishing that the agent

(retained by the seller) assumed no responsibility to the buyer for the accuracy of statements contained in the brochure.

While finding that no duty of care in respect of inaccuracies was owed by JLL to Mr. Walsh, the judgment discusses the limited scenarios (with examples from previous cases) where a seller's agent could be found to have assumed such a duty of care. In general, for such a duty of care to exist, the dealings between the agent and the buyer must be such that a special relationship arises between them, imposing on the agent a duty of care in giving the information. An example given in the judgment was a case where an agent had considerable interaction with the buyer and misrepresented to them that the property had been withdrawn at auction at a price and that the owners of the freehold would sell it. The buyer agreed to buy the leasehold interest in reliance on the agent's representations. It was held that the dealings between the parties were such that a special relationship had arisen between them, imposing a duty of care on the agent in giving the information. Another case where an agent was held to owe a duty of care to a buyer was where the buyers had limited property experience and asked the agent "to keep them straight".

#### IMPLICATIONS OF THE JUDGMENT FOR THE PROPERTY INDUSTRY

**Agents:** Agents should of course ensure that all promotional material is accurate, but equally they should ensure that a clear disclaimer is included. Agents should also ensure

that their conduct in any dealings with bidders does not negate the effect of such a disclaimer.

**Investors/buyers:** Prudent investors/buyers should carry out a detailed inspection and measure all floor areas before buying property. They should not rely solely on the measurements or any other information in a sale brochure containing a disclaimer. Comprehensive due diligence should be carried out to confirm the accuracy of any information in the sale brochure if reliance is placed on it, and in appropriate cases contractual commitments sought to give the buyer a remedy against the seller in respect of that information.

**Sellers:** Though not specifically mentioned in the Supreme Court judgment, sellers and their solicitors are reminded of the importance of "entire agreement" clauses in property contracts. Such clauses require the buyer to agree that no statement, measurement or calculation contained in any brochure or any other documents in respect of the property whether issued by or on behalf of the seller, the seller's agents or the seller's solicitors constitutes a representation inducing the buyer to enter into the sale.

The length of time it took for the Supreme Court appeal to be heard (the sale in question closed in September 2000, the High Court decision was given in 2007 and the appeal was not heard until 2017) is concerning but the judgment is a welcome clarification of the law on

negligent misstatement and the legal significance of disclaimers in brochures and other promotional material.

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