

BUSINESS LITIGATION ALERT

JULY 2009

Appeals Courts Rule in Favor of Business in an Environmental Dispute and a Purchase and Sale Transaction

Buyers Beware! On June 11, 2009, in *Hull v. Lewis*, the New Jersey Appellate Division held that a buyer of commercial real estate, after declining to conduct his own environmental audit, could not hold his lender responsible for site contamination where the lender failed to disclose its own environmental audit prior to closing.

Plaintiff Hull contracted to purchase property in Point Pleasant Beach and sought financing from the Defendant bank. Before lending, the bank required a Phase I Environmental Audit that met with its approval. Although Hull was given the option to conduct his own environmental audit, his contract with the seller did not require it, and thus he decided to go forward without his own audit. The bank retained an environmental consulting firm to perform its audit.

The bank's consultant conducted a "paper review" of the history of the site and an inspection of the facility, which was a coin laundry and two apartments. The consultant concluded that there were no obvious areas of environmental concern, but it noted that information about the use of perchloroethylene ("PCE") was not readily available. The consultant opined that, given the relatively small facility, it was unlikely that PCE was stored on-site in large quantities or in an underground storage tank. The consultant did not list PCE as an area of obvious environmental concern.

The bank informed Hull that it considered the results satisfactory, and it approved a loan. The bank never provided Hull with a copy of its environmental audit. When Hull attempted to

sell the property approximately nine years later, a Phase II site investigation revealed that the groundwater was significantly contaminated with PCE.

Hull filed suit against the bank and the bank's consultant alleging that they both had a duty to notify him of the results of the Phase I report before he purchased the property. Hull sought damages for the cost of remediating the property. He also sued the sellers, but those claims were amicably resolved.

The trial court awarded summary judgment to the bank and its consultant dismissing Hull's claims. The Appellate Division affirmed reasoning that there was no evidence that Hull relied on the bank's satisfaction with the environmental consultant's Phase I report in deciding to go ahead and close the lending transaction. Moreover, the Appellate Division held that even if he had relied on the bank's apparent confidence in the consultant's report, Hull's reliance would have been unreasonable because the lender's purpose in obtaining an audit was not necessarily the same as his. Absent any evidence that Hull reasonably relied upon the consultant's report, the bank and the consultant could not be held to have breached any duty to Hull.

Buyers of commercial real estate must beware of the transactions where they are not provided with or do not obtain Phase I audits. Banks, on the other hand, should feel relieved that, absent reasonable reliance by a buyer, their environmental reports cannot be used as a sword against them.

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Common sense prevails. In *Attanasio v. Austin Roberts Jewelers*, the New Jersey Appellate Division held that common sense is still a vital underpinning of the law.

Plaintiff Attanasio purchased a sapphire bracelet and earrings from Defendant Austin Roberts Jewelers as a gift for his wife. A little over three months later, Attanasio brought the jewelry back, claiming that the stones in the bracelet had lost color, and he demanded a refund. Initially, a store employee told Plaintiff that the store would issue a credit or would simply replace the bracelet. A couple of weeks later, when Plaintiff's wife arrived at the store to select a replacement, the store informed her that it would no longer honor the promise to issue a credit because it had determined the bracelet had been abused.

After a bench trial, the court found in favor of the Plaintiff. The trial court believed Defendant's experts who opined that Plaintiff likely exposed the bracelet to a chemical, possibly in a washing machine, causing the loss of the color. The trial court held, however, that Defendant did not fully disclose to Plaintiff how to properly take care of the bracelet. Thus, the court awarded Plaintiff monetary damages and costs of suit.

Defendant appealed, and the Appellate Division reversed in favor of the store holding that the trial court's decision was against the great weight of the evidence. The Appellate Division held

that a consumer has an obligation to exercise common sense, and therefore, in caring for the bracelet, the Plaintiff should not have exposed it to chemicals. The Court specifically stated that having accepted the Defendant's expert evidence that the bracelet had been abused by exposure to an abrasive substance, and having further found that common sense should prevent such an occurrence, the trial court's conclusion that the Defendant was liable for failure to inform the Plaintiff about proper care of the bracelet was "so . . . unsupportable as to result in denial of justice." In a victory for businesses, the Appellate Division held that the store's alleged failure to disclose how to care for the bracelet was trumped by the consumer's failure to exercise common sense.

For more information about any of the topics covered in this issue of the Business Litigation Alert, please contact:

Stephen R. Knox, Esq.
sknox@bressler.com

Michael T. Hensley, Esq.
mhensley@bressler.com

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BRESSLER, AMERY & ROSS

A PROFESSIONAL CORPORATION

17 State Street
New York, NY 10004
212.425.9300

325 Columbia Turnpike
Florham Park, NJ 07932
973.514.1200

2801 SW 149th Avenue
Miramar, FL 33027
954.499.7979

www.bressler.com