

Entire agreement, non-reliance clauses & contractual estoppel - what do they prevent and how?

Shantanu Majumdar, Radcliffe Chambers

<http://www.radcliffechambers.com/barrister-profile/shantanu-majumdar/overview>

In a series of decisions over recent years the English courts have adopted an uncompromising position in favour of the enforcement of entire agreement and non-reliance clauses. In so doing they have re-forged the so called doctrine of "contractual estoppel" so as to permit fiction to trump reality in the contents and interpretation of contracts to an unprecedented extent and with particular effects on banking and swaps and derivatives contracts¹ which widely deploy such clauses.

In this extract from the notes of a recent lecture, Shantanu Majumdar - who appeared in one of the leading cases *Peekay Intermark v ANZ Banking Group* [2006] 2 Lloyd's Rep 511 - considers the current position and its weaknesses.

1. In *Inntrepreneur Pub Co. v East Crown Ltd*², Lightman J described what he considered to be the eminent utility of entire agreement clauses on the basis that they:
 "... preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim.....to the existence of a collateral warranty."
2. The problem of pre-contract statements subsequently being characterised as collateral warranties or misrepresentations is a familiar one. The potential solution is the introduction of an entire contract clause³ (often linked with some form of effectively exclusionary clause in respect of misrepresentations).
3. Entire agreement clauses *per se* have no effect on the other party's ability to allege that representations are misrepresentations and for this reason their logical complement is the "non reliance clause" often now included in or as a limb of a clause containing an entire agreement clause and along lines such as the following

¹ See for example the ISDA Master Agreement(s).

² (2000) 41 EG 209

³ Which can be seen as an express agreement as to the full application of the parol evidence rule.

This Agreement contains the entire and only agreement between the parties and supersedes all previous agreements made between the parties respecting the subject matter hereof; each party acknowledges that in entering into this Agreement it has not relied on any representation or undertaking, whether oral or in writing, save such as are expressly incorporated herein.

4. Wording is all, but as a matter of public policy
 - a. a contracting party cannot exclude liability for its own fraud;

and

 - b. if it wishes to exclude liability for the fraud *of its agent* it must do so in clear and unmistakable terms on the face of the contract.

See *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* ⁴

5. The importance of expressly stating exactly what you want to exclude is illustrated by the decision of the TCC in *BSkyB Limited v HP Enterprise Services UK Limited*⁵ where there was an entire agreement clause but no non-reliance on representations clause:

Subject to Clause 1.3.2, this Agreement and the Schedules shall together represent the entire understanding and constitute the whole agreement between the parties in relation to its subject matter and supersede any previous discussions, correspondence, representations or agreement between the parties with respect thereto notwithstanding the existence of any provision of any such prior agreement that any rights or provisions of such prior agreement shall survive its termination. The term "this Agreement" shall be construed accordingly. **This clause does not exclude liability of either party for fraudulent misrepresentation. [emphasis added]**

The Defendant contended, amongst other things, that the implication of the last sentence was that the clause excluded non-fraudulent representations but the judge rejected that construction on the basis that the rest of the clause (*ie* but for the last sentence) did not in any event exclude liability for fraudulent (or indeed other) misrepresentation.

⁴ [2003] 2 Lloyd's Rep 61. HL

⁵ [2010] EWHC 86

... in the absence of words which do have that effect, I do not consider that such a statement can create an exclusion which it then negatives.

Express and clear words are required.

How do non-reliance clauses take effect?

6. In *EA Grimstead & Son Ltd v McGarrigan*⁶ the Court of Appeal held that an acknowledgement of non reliance was capable of operating as an evidential estoppel. It was

“apt to prevent the party who had given that acknowledgment from asserting in subsequent litigation against the party to whom it had been given that it was not true.”

But in order to raise such an estoppel, the party seeking to do so was under an obligation to plead and prove the three requirements stipulated in *Lowe v Lombank Ltd*⁷, namely that:

- a. the statements of non-reliance were clear and unambiguous;
- b. the person acknowledging non-reliance intended them to be relied on by the party raising the estoppel;
- c. the party raising the estoppel in fact believe the statements of non-reliance to be true and was induced by such belief to act upon them.

It is the third requirement which causes difficulty since in many (most) cases the party raising the estoppel will not necessarily believe that there was in fact no reliance!

7. But this restrictive way of looking at non-reliance clauses was fundamentally altered by the decision of the Court of Appeal in *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd*⁸ where Moore-Bick LJ said:

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,

⁶ (Oct 27th 1999, unrep, CA)

⁷ (1960) 1 WLR 196

⁸ [2006] 2 Lloyd's Rep 511

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: see **Colchester Borough Council v Smith [1991] Ch 448**, affirmed on appeal [1992] Ch 421.

57 It is common to include in certain kinds of contracts an express acknowledgment by each of the parties that they have not been induced to enter the contract by any representations other than those contained in the contract itself. The effectiveness of a clause of that kind may be challenged on the grounds that the contract as a whole, including the clause in question, can be avoided if in fact one or other party was induced to enter into it by misrepresentation. However, 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, or why a clause of that kind, if properly drafted, should not give rise to a contractual estoppel of the kind recognised in *Colchester Borough Council v Smith*. However, that particular question does not arise in this case. A clause of that kind may (depending on its terms) also be capable of giving rise to an estoppel by representation if the necessary elements can be established: see **E A Grimstead & Son Ltd v McGarrigan (CA) 27 October 1999**, unreported.

8. *Peekay* was applied in ***JP Morgan Chase Bank (formerly Chase Manhattan Bank) v Springwell Navigation Corp⁹*** where Gloster J said (at para 566) that

“In conclusion on this topic, I see nothing inappropriate or commercially offensive about Chase being permitted to rely on the statements contained in the relevant provisions, even if it could be said that in some respects they did not accurately reflect every aspect of the dealing relationship. All of the relevant terms of the contractual documentation fall squarely within the *Peekay* analysis, as contractual representations (and in some cases, warranties) or ‘agreements’ as to the basis upon which the business was to be conducted. Thus, for example, where the contract provided that, by placing an order, Springwell represented ... that it was a sophisticated investor and that it had independently and without reliance on Chase made a decision to acquire the instrument, that was not a mere statement of historical fact, but a contractual representation *71 forming the agreed and binding basis upon which the

⁹ [2008] EWHC 1186 (Comm)

parties would transact every future purchase. The same analysis applies in respect of every clause in every document to which Springwell takes this objection. The fact that some statements are expressed in the language of representation or acknowledgement cannot, in my view, make any difference to the analysis that the statements give rise to a contractual estoppel.”

9. It was also applied in *Titan Steel Wheels Ltd v Royal Bank of Scotland plc*¹⁰ where David Steel J said in the context of mis-selling allegations against the defendant bank

“that the terms outlined, taken as a whole, are only consistent with the conclusion that Titan and the Bank were agreeing to conduct their dealings on the basis that the Bank was not acting as an advisor nor undertaking any duty of care regardless of what recommendations, suggestions or advice were tendered.”

10. As Hamblen J succinctly put it in *Standard Chartered Bank v Ceylon Petroleum Corporation*¹¹ at para 544:

“The point and effect of the Non-Reliance Statements is to require the parties to accept a particular state of affairs as true, even if the actual reality was different. One cannot, merely by referring to what is asserted to be the underlying reality, avoid the effect of those provisions.”

11. So two independent estoppels are capable of arising (as Aikens J confirmed in *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd*¹²) and the enormous advantage of being able to assert *contractual* estoppel is that there is no need for the party relying on the non-reliance clause to prove that he believed the truth of the acknowledgment of non-reliance.

Statutory control

12. In *Watford Electronics v Sanderson*¹³ the Court of Appeal indicated – on the then state of the law as to non-reliance clauses – that as evidential estoppels

¹⁰ [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep 92. This case also notoriously decided that a company carrying on (any) business did not fall within the definition of “private person” in Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 and therefore cannot bring a claim for compensation under s 150 of the Financial Services and Markets Act 2000.

¹¹ [2011] EWHC 1785 (Comm)

¹² [2008] 2 Lloyd's Rep 581

¹³ [2001] 1 All ER (Comm) 696

they are not exclusion clauses and, therefore, not subject to regulation under the Unfair Contract Terms Act/Misrepresentation Act.

13. However, when viewed as giving rise to contractual estoppels then it may be that they do exclude liability for (mis)representations and therefore attract regulation as exclusion clauses. That was certainly the *obiter* assumption made by Aikens J in *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd*¹⁴, an assumption unchallenged on appeal in that case.
14. This approach was followed in *Foodco UK LLP (t/a Muffin Break) v Henry Boot Developments Limited*¹⁵ where, on the question of reasonableness, Lewison J referred to the judgment of Chadwick LJ in *EA Grimstead & Son Ltd v McGarrigan* (unreported, October 27, 1999):

There are, as it seems to me, at least two good reasons why the courts should not refuse to give effect to an acknowledgement of non-reliance in a commercial contract between experienced parties of equal bargaining power— a fortiori, where those parties have the benefit of professional advice. First, it is reasonable to assume that the parties desire commercial certainty. They want to order their affairs on the basis that the bargain between them can be found within the document which they have signed. They want to avoid the uncertainty of litigation based on allegations as to the content of oral discussions at pre-contractual meetings. Second, it is reasonable to assume that the price to be paid reflects the commercial risk which each party—or, more usually, the purchaser—is willing to accept. The risk is determined, in part at least, by the warranties which the vendor is prepared to give. The tighter the warranties, the less the risk and (in principle, at least) the greater the price the vendor will require and which the purchaser will be prepared to pay. It is legitimate, and commercially desirable, that both parties should be able to measure the risk, and agree the price, on the basis of the warranties which have been given and accepted.

Where, as they often will be, these conditions are fulfilled then the non-reliance clause will be reasonable.

¹⁴ [2008] 2 Lloyd's Rep 581

¹⁵ [2010] EWHC 358 (Ch). See also *Quest for Finance Ltd v Maxfield* [2007] 2 CLC 706

15. But contractual estoppels may not be regulated at all; it depends on their wording and effect. In *Raiffeisen Zentralbank v RBS plc*¹⁶ Christopher Clarke J said that

“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.”

In the former case, s 3 of the Misrepresentation Act 1967 might not apply at all.

16. These developments are not without divergence and, quite rightly, criticism.
- a. Not all English judges have been prepared to apply them in full where this is not driven by the wording of the particular clause: see *eg BSkYB Ltd v HP Enterprise Services UK Ltd*¹⁷ where the clause in question (only) provided that previous agreements and representations had been “superseded”. Ramsay J held that these words were apt only to prevent liability breach of warranty but not to exclude liability for misrepresentation.
 - b. Elsewhere, judges have declined to enforce such clauses where the facts of the case disclose a distinct inequality of bargaining power and sophistication.
 - i. In Singapore¹⁸
 1. *Als Memasa v UBS* [2012] SGCA 43 and
 2. *Deutsche Bank AG v Chang Tse Wen* where the Court of Appeal [2013] SGCA 49 overturned the controversial decision of the High Court in favour of the bank’s customer but in so doing appears

¹⁶ [2011] 1 Lloyd's Rep 123. See also *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Plc* [2011] EWHC 484, [2011] 1 CLC 701.

¹⁷ [2010] EWHC 86 (TCC), [2010] BLR 267.

¹⁸ Cf the decision enforcing such clauses against the sophisticated customer in *Orient Centre Investments v Societe Generale* [2007] SGCA 24[2007] 3 SLR(R) 566.

- a. to confirm that non-reliance clauses are subject to review under Singapore's unfair contracts legislation and
 - b. to leave open the question whether the doctrine of contractual estoppel is part of Singapore law.
- ii. In Hong Kong, on the other hand, contractual estoppel has been held to form part of the law of Hong Kong and was applied (here) in the case of someone considered to be a sophisticated investor, see *DBS Bank (Hong Kong Limited) v San-Hot HK Industrial Company Limited and Hao Ting* [2013] HKEC 352.
- c. Contractual estoppel
- i. makes no distinction between the sophisticated and the less sophisticated counterparty;
 - ii. appears to evade statutory control when its effect is practically (even if not theoretically) difficult to distinguish from exclusion clauses.
- d. The doctrine is, in any event, based on rather slender / doubtful jurisprudence. Where, for example, does one find the detrimental reliance and unconscionability which estoppel traditionally require?¹⁹

Shantanu Majumdar

Radcliffe Chambers, Lincoln's Inn

smajumdar@radcliffechambers.com

<http://www.radcliffechambers.com/barrister-profile/shantanu-majumdar/overview>

¹⁹ See Gerald McMeel: *Documentary fundamentalism in the Senior Courts: the myth of contractual estoppel* [2011] LMCLQ 185-207.