Entire Agreement Clauses

1. Entire Agreement Clauses seek to prevent the terms of the written contract from being added to or subtracted from as a result of something not to be found within the words of the contract itself. As such, these types of clause tend to focus on one or more of the following concepts: collateral warranties; misrepresentation; implied terms and estoppel.

2. "Entire Agreement Clause" is a composite term describing a number of "juridically different, but complementary" types of contractual provision (*Hipwell v Szurek* [2018] EWCA Civ 674, [3]).

3. *Ravennavi spa v New Century Shipbuilding Co Ltd* [2007] EWCA Civ 58

   Moore-Bick LJ

   [25] I am unable to accept the suggestion in the Buyer's skeleton argument that clauses of this kind can be construed by reference to their supposed purpose or that their significance is diminished if they are found among what are sometimes called the "boilerplate" provisions of a formal contract of this kind.

4. *Inntrepeneur v East Crown* [2000] 2 Lloyd's Law Reports 611

   This agreement [. . .] constitutes the entire Agreement between the parties.

   Lightman J

   [7] The purpose of an entire agreement clause is to 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 such as the present to the existence of a collateral warranty […] For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations […] shall have no contractual force, save insofar as they are reflected and given effect in that document. The operation of the clause […] is to denude what would otherwise constitute a collateral warranty of legal effect.

5. *Papanicola v Sandhu* [2011] EWHC 1431

   Simon Picken QC

   [39] [I]n general, an entire agreement clause is likely to be regarded as precluding reliance on a collateral contract or warranty.

6. *North Eastern Properties v Coleman* [2010] 3 All ER 528

   Longmore LJ

   If the parties agree that the written contract is to be the entire contract, it is no business of the courts to tell them that they do not mean what they have said.

7. *Hipwell v Szurek* [2018] EWCA Civ 674

   The written agreement "constitutes the entire agreement and understanding of the parties relating to the transaction".

   Hildyard J

   [20] the Entire Agreement Provisions which under English law would ordinarily be given full force and conclusive effect as an integral part of the parties' bargain in accordance with its terms.

8. *Inntrepeneur v East Crown* [2000] 2 Lloyd's Law Reports 611

   [8] An entire agreement provision does not preclude a claim in misrepresentation, for the denial of contractual force to a statement cannot affect the status of the statement as a misrepresentation.

9. *AXA Sun Life Services v Campbell Martin* [2011] EWCA Civ 133

   This Agreement and the Schedules and documents referred to herein constitute the entire agreement and understanding between you and us in relation to the subject matter thereof. Without prejudice to any variation as provided in clause 1.1, this Agreement shall supersede any prior promises, agreements, representations, undertakings or implications whether made orally or in writing between you and us relating to the subject matter of this Agreement […]

Rix LJ

[81] In these circumstances, I would be inclined, subject to authority, to regard clause 24 as being concerned only with matters of agreement, and not with misrepresentation at all. The essence of agreement is that it is concerned with matters which the parties have agreed. The essence of misrepresentation, however, is that it is not concerned with what the parties have agreed, but rather with inaccurate statements […] [which] have been relied on by the representee in entering into their agreement […] In a clause therefore in which three parts are plainly concerned only with agreement, including two other parts of the self-same sentence, and in which all the other sibling words in the critical part (iii) are words of agreement, and where the critical single word "representations" (not mis representations) is likely in context to refer to representations which might be argued, but for the clause, to have become terms of the agreement, and where the other important word "supersede" is essentially a word of agreement rather than exclusion, I would thus provisionally conclude that misrepresentation and the exclusion of misrepresentation or liability for it are simply not the business of the clause at all.

10. *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573, 596

Jacob J

[I]f a clause is to have the effect of excluding or reducing remedies for damaging untrue statements then the party seeking that protection cannot be mealy-mouthed in his clause. He must bring it home that he is limiting liability for falsehoods he may have told.

11. *First Tower Trustees v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396

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. *Lowe v Lombank* [1960] 1 WLR 196

Diplock J (sitting in Court of Appeal)

To call it an agreement as well as an acknowledgment by the plaintiff cannot convert a statement as to past facts, known by both parties to be untrue, into a contractual obligation, which is essentially a promise by the promisor to the promisee that acts

will be done in the future or that facts exist at the time of the promise or will exist in the future. To say that the hirer "agrees" that he has not done something in the past means no more than that the hirer, at the request of the owner, represents that he has not done that thing in the past. If intended by the hirer to be acted upon by the person to whom the representation is made, believed to be true by such person and acted upon by such person to his detriment, it can give rise to an estoppel: it cannot give rise to any positive contractual obligation. Although contained in the same document as the contract, it is not a contractual promise.

13. *Watford Electronics v Sanderson* [2001] EWCA Civ 317

Chadwick LJ

[40] What the acknowledgement seeks to do is to prevent the person to whom the representation was made from asserting that he relied upon it. If it is to have that effect, it will be necessary — as I sought to point out in Grimstead v McGarrigan — for the party who seeks to set up the acknowledgement as an evidential estoppel to plead and prove that the three requirements identified by this Court in Lowe v Lombank Ltd [1960] 1 WLR 196 are satisfied. That may present insuperable difficulties; not least because it may be impossible for a party who has made representations which he intended should be relied upon to satisfy the court that he entered into the contract in the belief that a statement by the other party that he had not relied upon those representations was true.

14. *Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd* [2006] EWCA Civ 386

Moore-Bick LJ (with whom Chadwick LJ and Collins J agreed)

[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: 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.

15. *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221

Aikens LJ (with whom Rix and Rimer LJJ agreed)

[143] Before I examine Lowe v Lombank and subsequent cases on this issue, I will try and analyse the matter from principle. 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.

[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 pre-contract representations to B about the quality or nature of a financial instrument that A is selling to B. Should it make any difference that both A and B know at and before making the contract, that A did, in fact, make representations, so that the statement that A had not is contrary to what each side knows is the case? [. . .] I am unaware of any legal principle to that effect. [. . .] Like Moore-Bick LJ in Peekay162 I see commercial utility in such clauses being enforceable, so that parties know precisely the basis on which they are entering into their contractual relationship.

[155] I have concluded that the remarks of Diplock J in Lowe v Lombank quoted above are not binding authority for the far-reaching proposition that there can never be an agreement in a contract that the parties are conducting their dealings on the basis that a past event had not occurred or that a particular fact was the case, even if it was not the case and both the parties knew it was not.

[169] In my view the statements of Moore-Bick LJ are consistent with principle and authority. For the reasons that I have already set out, the statements of Diplock J in Lowe v Lombank which I have quoted were not necessary for the decision in that case and are not binding in the present context.

16. *First Tower Trustees* [2018] EWCA Civ 1396

Lewison LJ

[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.

17. *UBS AG v Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC 3615 (Comm)

Males J

[773] UBS accepts that the entire agreement and non-reliance clauses on which it relies cannot assist it to defeat a claim in fraud, and would only be relevant if any misrepresentation was negligent or innocent.

18. *Aquila v Onur Air* [2018] EWHC 519 (Comm)

Cockerill J

[112] Insofar as any fraudulent representation is properly pleaded and can arguably be established, it seems to me that the portions of the clauses relied upon by Aquila which relate to representations are highly unlikely to bite as a matter of law. [. . .] The rationale behind this is that a party should not benefit from his fraud.

[113] I do not see how this affects the position on inducement. Even if one ignores the portion of Clause 5 which records the parties' agreement that there are no representations made, that does not delete the remainder of the parties' contractual bargain. What this means is that the effect of the remainder of Clause 5 and the Acceptance Certificate on any such representations is to prevent Onur saying that they were induced by any such misrepresentations. And again Onur's problems on inducement based on their own evidence are unaffected. I would therefore if necessary find that the misrepresentation case, even to the extent that it is a proper fraud case, would fail on this head."

19. Misrepresentation Act 1967, s.3

(1) 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.

[. . .]

20. *First Tower Trustees* [2018] EWCA Civ 1396

Leggatt LJ

[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.

[107] 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.

[111] [. . .] 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 the 1977 Act.

21. *Jet2.Com Ltd v Blackpool Airport Ltd* [2010] EWHC 3166

Beatson J

Entire agreement clause read:

"The terms set out in this Letter Agreement represent the whole agreement between BAL…and Jet2.com in relation to their subject matter and cannot be changed except by a written document signed by all such parties."

[40] [. . .] a clause in suitable terms could preclude estoppel.

22. *AXA Sun Life Services v Campbell Martin* [2011] EWCA Civ 133

Stanley Burnton LJ

[41] Such terms, if otherwise to be implied, are not excluded by clause 24. As intrinsic provisions of the Agreement, they are within the expression "This Agreement and the Schedules and documents referred to herein".

See, to similar effect, The Helen Knutsen [2003] 2 Ll Rep 686, [27] *per* Nigel Teare QC

23. *JN Hipwell v Szurek* [2018]

[27] [A]n important concession was made by Counsel for the Appellant. This was that an entire agreement provision does not affect or prevent the implication of a term to be implied on grounds of business efficacy. In my view, that concession was entirely correctly made: a contract lacking business efficacy must, if possible, be supplemented to cure the defect. It cannot be supposed that the parties would have intended an entire agreement clause to cause the agreement to fail, and to prevent the court from saving it, if there is an available and appropriate means of doing so consistently with, and indeed to give effect to, what the Court finds must have been the true intentions of the parties.

24. *AXA Sun Life Services v Campbell Martin* [2011] EWCA Civ 133

Stanley Burnton LJ

[41] The Agreement might have included, but does not include, an express specific exclusion of such implied terms.

25. *Rock Advertising v MWB Business Exchange Centres* [2018] UKSC 24

"All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect."

Lord Sumption

[10] In my opinion the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation.

[11] Party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows. Nearly all contracts bind the parties to some course of action, and to that extent restrict their autonomy. The real offence against party autonomy is the suggestion that they cannot bind themselves as to the form of any variation, even if that is what they have agreed.

[14] Entire agreement clauses generally provide that they "set out the entire agreement between the parties and supersede all proposals and prior agreements, arrangements and understandings between the parties." […] Such clauses are commonly coupled (as they are here) with No Oral Modification clauses addressing the position after the contract is made.

Daniel Hubbard
One Essex Court
14th May 2020