Litigation

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English Law Contracts: 'Representations' May Not Include or Exclude 'Misrepresentations'

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In Axa Sun Life Services plc v Campbell Martin Ltd and others [2011] EWCA Civ 133*, the Court of Appeal for England and Wales rejected attempts by AXA to use an entire agreement clause to prevent the Campbell Martin parties from bringing claims based on alleged misrepresentations and breach of collateral warranties or implied terms. The Court of Appeal found that, since the entire agreement clause under consideration was a basic 'boilerplate' statement, the clause as worded was ineffective to exclude misrepresentations. It was also found not to exclude implied terms that were necessary to give the contract business efficacy, but it did exclude collateral warranties and other extrinsic terms. The Court of Appeal based its conclusions on the particular wording of the clause, but the decision and its reasoning are significant for parties to English law contracts as it provides guidance on the drafting and use of these clauses. The Court of Appeal also considered the application of the Unfair Contract Terms Act 1977 to the entire agreement, set-off and conclusive evidence clauses.*

The Dispute and Decision at First Instance

AXA had entered into agreements on its standard form with each of the respondents appointing them agents to sell its financial products on commission. The agreements provided that AXA was entitled to claw back commissions paid to the agents if customers later cancelled the product they had purchased. After terminating the agency agreements, AXA brought claims against each of the agents for commission clawbacks and other sums. The agents contested these claims and argued that AXA had made certain negligent and fraudulent misrepresentations and other collateral warranties in order to induce them to enter into the agreements. The agents further argued that certain terms imposing obligations on AXA

should be implied and read into the agreements, and that AXA had breached those implied terms causing the agents further loss and damage for which they were entitled to be compensated.

A trial was held on four issues concerning the effect of certain provisions of the agreement, and the application of the Unfair Contract Terms Act 1977 (UCTA) to those provisions, namely:

I. whether the entire agreement clause prevented the agents from alleging that AXA had made non-fraudulent misrepresentations or from alleging the existence of any collateral warranties and/or implied terms;

II. whether the set-off clause prevented the agents from claiming set-off in respect of sums counterclaimed against AXA;

III. whether the conclusive evidence clause giving AXA the exclusive right to determine amounts due under the agreement prevented the court from determining amounts due in the absence of manifest error; and

IV. if the answer to the second and third issues was "yes", whether the relevant clauses satisfied the reasonableness test set out in UCTA.

The judge held that:

I. the particular entire agreement clause under consideration was not sufficient to exclude liability for misrepresentation by AXA;

II. the set-off clause was unenforceable because the agents had entered the agreement on the basis of misrepresentations made by AXA and such misrepresentations rendered the whole agreement unenforceable;

III. the conclusive evidence clause was unenforceable for the same reason; and

IV. the question of whether the clauses under consideration satisfied the UCTA reasonableness test did not arise, given the judge's findings on the first three issues.

The trial judge relied on *Curtis v Chemical and Dyeing Co [1951] 1 KB 805* as authority for the proposition that a misrepresentation as to the effect of an exemption clause will prevent the party guilty of the misrepresentation from reliance on that clause (see also, *Chitty on Contracts, 30th ed., para 14-132*). Thus, AXA's misrepresentations rendered the whole agreement unenforceable.

AXA's appeal

AXA appealed to the Court of Appeal. The parties in the appeal agreed that the entire agreement clause was effective in accordance with its terms, as per *Springwell Navigation Corporation v JP Morgan Chase Bank [2010] EWCA Civ 1221*. They also acknowledged that the clause in consideration excluded collateral warranties. Therefore, the issue at hand was whether the clause, as drafted, operated to eliminate and/or exclude liability for misrepresentation. AXA argued that, properly construed, the entire agreement clause should be read to exclude misrepresentations or any liability for them at least in relation to misrepresentations as to the terms of the agreement. AXA also argued that the entire agreement clause operated to

exclude any and all implied terms, and that the set-off clause and the conclusive evidence clause should have been given preclusive contractual effect, subject only to the reasonable test in UCTA.

The Court of Appeal agreed with the trial judge's finding that the entire agreement clause in question did not exclude liability for misrepresentation, but disagreed with his reasoning. It expressly rejected the trial judge's finding that AXA's purported misrepresentations rendered the whole agreement unenforceable, noting that a misrepresentation, if established, may entitle the innocent party to rescind the agreement. The Court of Appeal disagreed with the judge's findings on the set-off and conclusive evidence clauses, and consequently made a finding on the UCTA issue.

Stanley Burnton LJ delivered the lead judgment for the court. He did not form any general conclusions on the use of entire agreement statements to exclude liability for misrepresentations, but found that the clause at issue was not effective to exclude liability for misrepresentation. The entire agreement clause included the language that "…this Agreement shall supersede any prior…representations….whether made orally or in writing between you and us relating to the subject matter of this Agreement…" The judge ruled that it was difficult to read the word "representations" so as to cover "misrepresentations" or representations as to the terms (as opposed to the subject matter) of the Agreement. He further found that the entire agreement clause did not prevent terms from being implied into the agreement that were necessary to give the agreement business efficacy. Business efficacy terms were to be considered "intrinsic" and contemporaneous to the agreement; as they were not "prior" to the agreement they were unaffected by the exclusion. The agreement might have included an express specific exclusion of such implied terms but did not. The judge found that the clause did have the effect of excluding terms that might otherwise have been implied as "extrinsic" to the agreement.

Rix LJ delivered a separate judgment, as his reasoning differed in certain respects but reached the same conclusion. He analysed the text of the entire agreement clause in detail and concluded that it did not exclude liability for misrepresentations of any kind because the clause was concerned with matters of agreement only. The inclusion of the word "representations" in the middle of the list of words of contractual import such as "promises, agreements … undertakings or implications" has to be read as referring to representations which but for the clause might be considered to have become terms of the agreement. This did not include misrepresentations.

Rix LJ considered the authorities on the use of entire agreement statements to exclude liability for misrepresentation. He agreed with Ramsey J's finding in *BSkyB v HP Enterprise Services UK Ltd [2010] EWHC 86* that, in the context of an entire agreement statement, use of words such as "representations" and "supersede" are for the purpose of defining contractual obligations, as opposed to excluding liability for misrepresentation. Any exclusion of liability for misrepresentation must be clearly stated. Typically this is achieved by the inclusion of clauses which state that no representations have been made (as was the case in *Springwell*), or that there has been no reliance on any representations (as was the case in *BSkyB*), or by an express exclusion of liability for misrepresentation. In the absence of such express and specific wording, and particularly where the word "representations" is found only among other words expressing contractual obligation, a general provision that the parties' contract supersedes prior agreements or representations will not by itself absolve a party of liability for misrepresentation. He further found, without explanation, that the entire agreement clause did not exclude implied terms.

The Court of Appeal then overturned the first instance judge on the set-off and conclusive evidence clauses, holding that they took effect in accordance with their terms, subject to UCTA.

Turning to the UCTA analysis, the Court of Appeal found that the entire agreement clause was subject to section 3(2)(b)(i) of UCTA and therefore subject to the UCTA reasonableness test. It concluded that, under the circumstances, the entire agreement clause passed the UCTA test. The Court noted that an entire agreement clause excluding collateral warranties is a common and businesslike clause for parties entering into a carefully worked-up agreement. The contractual provisions in issue were not unusual in the insurance industry and the evidence before the first instance judge was that they were standard terms. Moreover, the agreement was between commercial organizations, the agents were financial advisers who could be expected to have read the agreement, and none of the agents gave evidence that they had not read, or were denied an adequate opportunity to read, the agreement. Nor could it be said that the agents had "an opportunity of entering into a similar contract with other persons, but without having to accept a similar term" as they could have carried on business, or continued to carry on business, as independent financial advisers. Finally, as a matter of policy, an entire agreement statement was found to provide both sides with certainty as to the terms of their contract, with the beneficial effect of limiting the costs involved in litigation or of avoiding litigation entirely.

The Court of Appeal also found that the conclusive evidence clause satisfied the UCTA reasonableness test. That the clause under consideration included a carve-out for manifest error appears to have been key to this conclusion, as the Court felt it was reasonable to expect the agents to keep track of the amounts due to and from them, and they ought to be able to show that any error was an obvious one. If they could not, it was fair to limit disputes in court to whether an error was manifest or not.

The set-off clause did not fare as well. The Court of Appeal found that it failed the UCTA reasonableness test on the grounds that it was not mutual and there was no explanation or justification for a unilateral clause in AXA's favor. *Stewart Gill Ltd v Horatio Myer & Co Ltd [1992] 1 QB 600* was cited as supporting the conclusion that the clause was unreasonable.

Comment

The main lesson to be learned from this judgment is that an entire agreement clause is not "just boilerplate", and must be drafted carefully, not only as to misrepresentations but as to exclusion of implied terms. Stanley Burnton LJ appears to suggest that had AXA included an "express specific exclusion of such terms", this would have been effective to exclude implied terms. However, Rix LJ found, without explanation, that the entire agreement clause, at least as written here, did not exclude implied terms. Again, the peril is in the use of a boilerplate form that is not carefully crafted and drafted to express a clear intent and agreement of the parties on these points. The wise will attend to these clauses with care. Particular attention need also be given to attempts to exclude provisions or terms implied by statute, terms implied by common law to give the contract business efficacy, and terms implied from the parties' previous dealings or custom or course of dealings in the trade or industry.

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