

## Recent Contract Law Cases Relevant in the Financial Services Industry

This *DechertOnPoint* examines some decisions of the English courts in the past year that may have relevance in the financial services industry. It is aimed primarily at in-house counsel and covers decisions in the following areas:

- excluding liability for misrepresentation
- interpretation
- the *contra proferentem* rule
- letters of intent, "subject to contract" and contract formation
- penalties
- "true and fair" warranties
- damages for fraudulent misrepresentation
- the Unfair Contract Terms Act

### Excluding Liability for Misrepresentation

*Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland* [2010] EWHC 1392

*BSkyB Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 86 (TCC)

*Foodco UK Ltd v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch)

*Titan Wheels Ltd v RBS* [2010] EWHC 211 (Comm)

*Springwell Navigation Corporation v JP Morgan Chase Bank* [2010] EWCA Civ 1221

*Axa Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133

*Camarata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm)

*Bank Leumi (UK) Plc v Wachner* [2011] EWHC 656 (Comm)

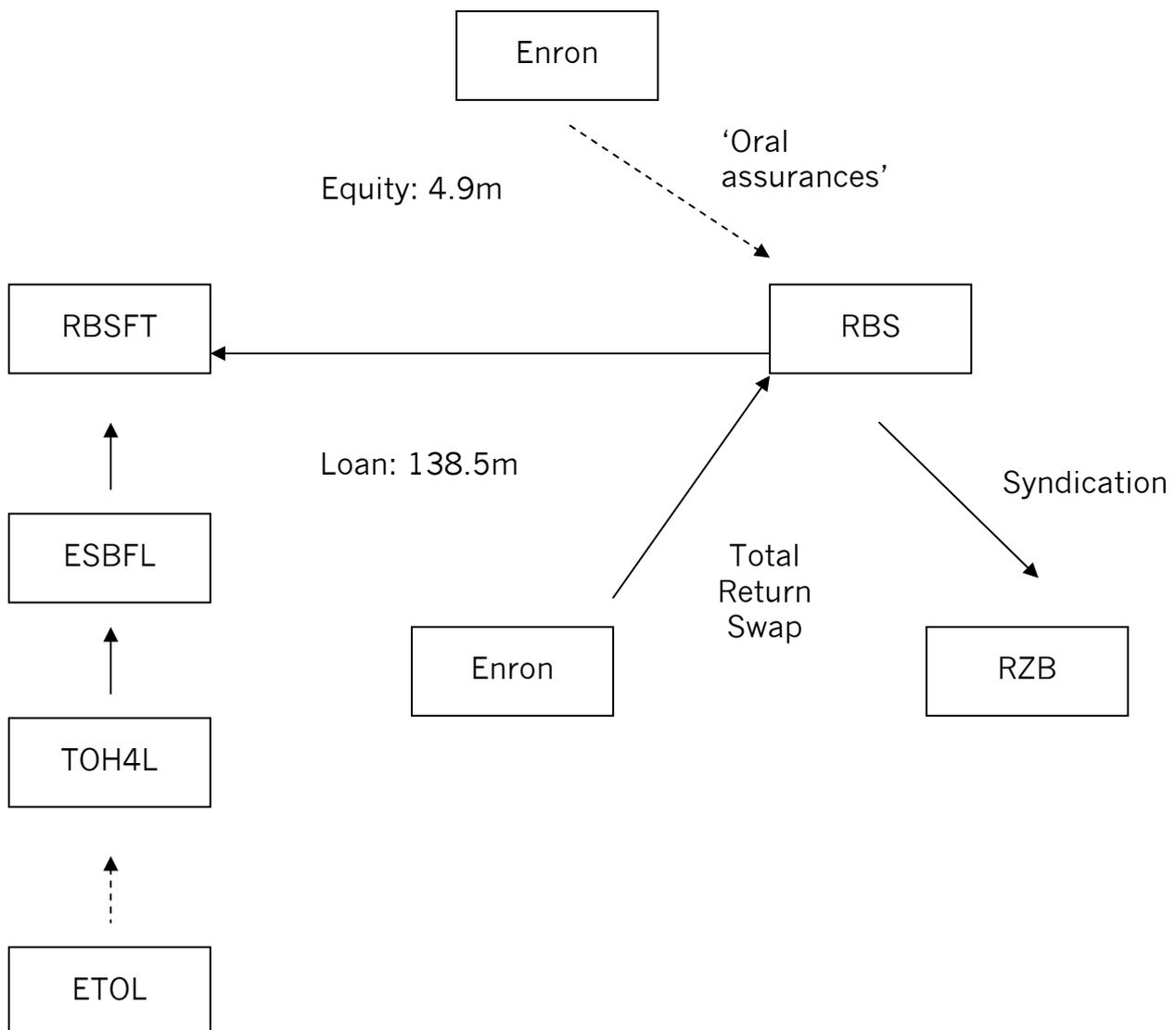
*Casa di Risparmio Della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm)

A detailed understanding of the complex loan arrangements in the *Raiffeisen* case is thankfully not essential to an understanding of the approach taken generally by Christopher Clarke J. to certain, now common, provisions in banking documentation (information memoranda, confidentiality agreements and similar documents) the aim of which is to avoid or exclude liability for misrepresentation. At the risk of over-simplification, the transaction which was the subject of the case may be represented in Figure 1 on page 2.

Enron wished to monetize the dividend stream from ETOL. This was done by TOH4L issuing preference shares to ESBFL with a 13.5 per cent dividend, to be funded by the right of TOH4L to receive dividends from ETOL.

The shares were then sold by ESBFL to a special purpose vehicle (SPV) RBSFT which was capitalised by equity and a loan from RBS. The equity element was necessary because RBSFT had to have at least 3 per cent of equity at risk. This was necessary as part of a scheme which would allow Enron to show in its accounts the profit on the sale of the shares, but not the loan to RBSFT. Enron entered into a Total Return Swap with RBS, in effect guaranteeing the loan. However, it gave only oral assurances to the effect that RBS would recover the full amount of its equity and a return of 13.5 per cent. RBS then syndicated the loan and RZB agreed to take a £10m share. Enron then collapsed, when only c.£4.75m of the loan had been repaid. RZB claimed the

FIGURE 1



balance plus interest from RBS on the basis of misrepresentation.

In the contractual documentation to facilitate the syndication, RZB was informed of the basic structure (described as above) but was not told about the oral assurances. According to RZB that had the effect that RBS had made four representations which it claimed were false:

- that there was 'no support' for RBS' equity other than as identified;
- the manner in which the transaction was to be unwound was as stated in the materials;

- the transaction satisfied the accounting principles necessary to achieve its intended purpose lawfully; and
- that there was nothing improper or unlawful about the transaction or the way in which it was to be treated.

In establishing any liability of RBS for misrepresentation certain 'Relevant Provisions' in the Information Memorandum (the "IM") and the Confidentiality Agreement (the "CA") fell to be taken into account. They are rather lengthy and are not set out in their entirety, but the following extracts will give the flavour of them:

From the IM:

“The contents of this Memorandum have not been independently verified. No representation, warranty or undertaking (express or implied) is made, and no responsibility is accepted as to the adequacy, accuracy, completeness or reasonableness of this Memorandum or any further information, notice or other document at any time supplied in connection with the Facility.”

“This Memorandum is being provided for information purposes only and is not intended to provide the basis of any credit decision or other evaluation and should not be considered as a recommendation that any recipient of this Memorandum should participate in the Facility. Each potential participant should determine its interest in participating in the Facility based, upon such investigations and analysis as it deems necessary for such purpose.”

“No undertaking is given to assess or keep under review the business, financial condition, prospects, creditworthiness, status or affairs of the Company, the Borrower or any other person now or at any time during the life of the Facility or (except as specifically provided in the Facility Agreement) to provide any recipient or participant in the Facility with any information relating to the Company, the Borrower or otherwise.”

From the CA:

“The Recipient [i.e., RZB] acknowledges and agrees that:

- (a) RBS and its Affiliates, officers, employees, agents, and professional advisers do not make any representation or warranty, express or implied as to, or assume any responsibility for, the accuracy, adequacy, reliability or completeness of any of the Confidential Information;
- (b) RBS and its Affiliates, officers, employees, agents and professional advisers shall be under no obligation to update or correct any inaccuracy in the Confidential Information or be otherwise liable in respect of the Confidential Information; and

- (c) The Confidential Information is not intended to provide the sole basis of any credit evaluation and should not be considered to be a recommendation that the Recipient participate in the Transaction.”

In a broad ranging judgment, Christopher Clark J. dealt with questions such as when is an implied representation made, when is it false, what is the test of inducement and other issues. They are beyond the confines of this *DechertOnPoint*, however, focuses only on the effect of the Relevant Provisions.

Their principal effect went to the question of whether, if any representations were made, RZB was nonetheless estopped from contending that they were. This is considered below. However, they also had an earlier role to play.

RZB’s claims failed at the first hurdle in that the judge found that none of the representations had been made. This finding rested mainly on the fact that any such representations could only have been implied and there was no basis for such implication. For example, in relation to alleged representation (c) above, it was found that RBS was not making any implied representation as to the legality of the transaction:

“No bank receiving the IM would reasonably understand that that was what RBS, as Arranger, was representing to them. Assurances as to the legality of a transaction or any matter related to it are, in this field, obtained by legal opinions from lawyers with expertise in respect of the relevant laws (not, so far as presently relevant, English) who accept professional responsibility and liability for what they represent to those to whom their opinions are addressed. Assurances in respect of compliance with relevant accountancy rules, principles and standards are obtained, if required, from an accountancy expert. An arranging bank would not regard itself as giving, nor would a bank reading the IM (which does not refer to the accounting treatment proposed), reasonably regard itself as receiving, a representation that as a matter of objective fact the ETOL transaction and the method of accounting for it was lawful and proper in all respects.

However, the Relevant Provisions also had a role to play in establishing whether any representations were ever made:

“That no representation of an absence of support was impliedly being made is underscored by the terms of the IM and Confidentiality Agreement. Regardless of any question of contract or estoppel these indicated to the banks to whom they were presented that no representation express or implied was being made as to the accuracy or, most importantly, completeness of the information. Even express statements are not to be treated as representations “*where, having regard to all the circumstances it is unreasonable of the representee to rely on the representor’s statements rather than his own judgement*” – *Chitty*, 30th Ed, para 6-012; and the case of implied statements is a fortiori. In the light of the Relevant Provisions it was not reasonable for RZB to assume that a “no support” representation was impliedly being made.”

The more obvious role for the Relevant Provisions was the estoppel role and the possible application of the test of reasonableness under Section 3 of the Misrepresentation Act 1967. In this regard, the decision does not really alter what seemed to have become the settled law but it is helpful to have it confirmed and to have it confirmed in such an authoritative way, in that the judge reviewed all of the considerable number of previous decisions which had dealt with these issues. What he confirms is as follows.

Provisions such as those under consideration operate to create a contractual estoppel,<sup>1</sup> i.e., if the parties agree that a particular state of affairs is to be the basis upon which they are contracting, they are held to that basis, regardless of whether or not that state of affairs is true. Thus, if they agree that the contract is being entered on the basis that no representations have been made, then their claims are assessed on the basis that no representations have been made, even if, in fact, they have been made.

Without going into the details, there are observations of Diplock J. in *Lowe v Lombank*<sup>2</sup> which

<sup>1</sup> See: *Peekay Intermark Ltd v ANZ Banking Group Ltd* [2006] EWCA Civ 386; *Foodco UK Ltd v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch); *Titan Wheels Ltd v RBS* [2010] EWHC 211 (Comm).

<sup>2</sup> [1960] 1 WLR 196

suggest that it is not possible for parties via the mechanism of a contractual promise to deny the existence of past facts, but if that is what was being suggested, Christopher Clarke J regarded it as wrong. It is not an argument that is likely to be seen again.<sup>3</sup> Provisions of the type under consideration will be assessed as giving rise to a contractual estoppel, and not estoppel by representation, which is not always effective because it is not always possible for D to establish that he relied on C’s representation that he did not rely on D’s original misrepresentation.<sup>4</sup>

But what then of the possible application of Section 3 of the 1967 Act which states:

“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.”

Christopher Clarke J endorsed the view of Toulson J. in the *Goldman Sachs* case<sup>5</sup> that the question of whether provisions of the type under consideration fall under Section 3 is a question of substance and not form. The passages from Toulson J. are as follows:

“The question is one of substance and not form. If a seller of a car said to a buyer “I have serviced the car since it was new, it has had only one owner and the clock reading is accurate”, those statements would be representations, and they would still have that character even if the seller added the words “but those statements are not representations on which you can rely”.

<sup>3</sup> In *Springwell* (see below) the Court of Appeal viewed *Lowe v Lombank* slightly differently, but reached the same conclusion that it was no obstacle to the use of contractual estoppel.

<sup>4</sup> As in *Quest Finance Ltd v Maxfield* [2007] EWHC 2313.

<sup>5</sup> *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm) and [2007] EWCA Civ 811.

*Cremdean Properties Ltd v Nash* [1977] EGLR 80, which Mr Nash cited, is authority for the principle that a party cannot by a carefully chosen form of wording circumvent the statutory controls on exclusion of liability for a representation which has on proper analysis been made.

If, however, the seller of the car said “The clock reading is 20,000 miles, but I have no knowledge whether the reading is true or false”, the position would be different, because the qualifying words could not fairly be regarded as an attempt to exclude liability for a false representation arising from the first half of the sentence.”

Of course, which situation is, in substance, before the court will not always be easy to determine. As Christopher Clarke J says: ‘everything must depend on the facts’. His further observations of particular note are as follows:

“In this respect the key question, as it seems to me, is whether the clause attempts to rewrite history or parts company with reality. If sophisticated commercial parties agree, in terms of which they are both aware, to regulate their future relationship by prescribing the basis on which they will be dealing with each other and what representations they are or are not making, a suitably drafted clause may properly be regarded as establishing that no representations (or none other than honest belief) are being made or are intended to be relied on. Such parties are capable of distinguishing between statements which are to be treated as representations on which the recipient is entitled to rely, and statements which do not have that character, and should be allowed to agree among themselves into which category any given statement may fall.”

“Per contra, to tell the man in the street that the car you are selling him is perfect and then agree that the basis of your contract is that no representations have been made or relied on, may be nothing more than an attempt retrospectively to alter the character and effect of what has gone before, and in substance an attempt to exclude or restrict liability.”

“In contracting in terms such as those in the Confidentiality Agreement the parties are in effect saying that the contents of the IM are believed to be true but that no warranty or representation is being given as to the accuracy or completeness of the contents (or the reasonableness of that belief). In the result the Arranger will be potentially liable if the author does not in fact believe the contents to be true; but not otherwise.”

A point to note is the significance of the timing of the IM and CA, i.e, that they were in place at the *start* of the negotiations. If representations are made and relied upon and *then* the parties introduce the ‘no representation’ or ‘non-reliance’ clauses in the executed contract, that will increase the likelihood that they will be treated in substance as exclusion clauses:

“If there had been no IM and no Confidentiality Agreement, and representations (or what looked like them) had been made by RBS to RZB, it may be that the provisions in the Facility Agreement (to which RZB became a party by novation) that no representations had been made and no responsibility was accepted for any information that had been provided, should be regarded as attempts at exclusion of liability. In view of the conclusions I have reached it is not necessary to consider this further. The provisions in question re-affirmed a position already in place.”

If Section 3 did apply, Christopher Clark J. held that nonetheless the provisions were reasonable. That will obviously be the very likely finding in a contract between sophisticated commercial entities, but it should not be regarded as foolproof. One also needs to bear in mind that in this, as in many other cases, the court’s primary finding was that no representations were made, or were relied upon and the relevant provisions reinforced that finding (see above). In a case where the finding is that representations were in fact made and relied upon, the estoppel reasoning will still apply, but Section 3 of the 1967 Act will also undoubtedly apply and the attempt to re-write history may go a long way to supporting a finding that the provisions were unreasonable.

In *Springwell Navigation Corporation v. JP Morgan Chase Bank* [2010] EWCA Civ 122, where a claim was brought for mis-selling of certain investments,

the types of provisions which fell for consideration were as follows:

“4. Neither CMB nor CMIL nor Cmp are required to give you investment advice generally or in relation to specific investments, make any enquiries about, or to consider, your particular financial circumstances or investment objectives. By placing an order with CMB or CMIL, or Cmp, you represent that you are a sophisticated investor, are purchasing the instrument concerned for your own account for investment purposes and not with a view to any distribution thereof, and that you have independently, without reliance on CMB or CMIL or Cmp, or any associated person, made a decision to acquire the instrument having examined such information relating to the instrument and the issuer thereof as you deem relevant and appropriate. You have represented to CMB and CMrt, and Cmp, and therefore they have assumed that, you are fully familiar with and able to evaluate the merits and risks associated with such instruments and any consequence of these instruments forming part of a portfolio of investments and are able to assume the risk of loss associated with such instruments. You should therefore consider whether an instrument is appropriate in your particular financial circumstances or in the light of your investment objectives.”

“6. When providing you with any circular, information memorandum, investment advertisement, published recommendation or any other written or oral information regarding any instrument or investment opportunity neither CMB nor CMIL nor Cmp, will have taken any independent steps to verify the document or information and no representation or warranty, express or implied, is or will be made by either CMB or CMIL or Cmp...”

“(c) the Holder has not relied on, and acknowledges that neither CMSCI nor CMIL has made, any representation or warranty with respect to the advisability of purchasing this Note.”

Aikens LJ held in *Springwell* that the terms of paragraph 4 went to the scope of the contract between the parties and did not therefore fall within Section 3. But he inclined to the view that

paragraphs 6 and (c) were, in substance, exclusion clauses and therefore subject to Section 3.

Again this needs to be seen in context. What Aikens LJ seems to be saying is that *if* representations clearly have been made, then clauses like 6 and (c) (no representation, non-reliance) will be regarded as exclusion clauses. But where there is doubt about whether representations have been made, or have been made by the defendant, such clauses can also be regarded as defining the duty of the parties and not excluding any anterior liability.

In this regard, it is notable that in *RZB v RBS* the claimant was trying to rely on implied representations and in *Goldman Sachs* the defendant was passing on information obtained from a third party. In those two instances the court did not think that the relevant provisions were caught by Section 3.

If *RBS* and *Springwell* are pretty robust decisions that clauses of the type under consideration can be very effective in controlling liability for misrepresentation, but it remains the case that one still has to draft them appropriately. For an instructive example of drafting which failed at this first hurdle, one should consider the decision in the *BSkyB* case in which the following clause was considered:

“...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...”

Although that clause referred to ‘representations’ it failed to exclude claims for misrepresentation, for the following reasons given by Ramsey J.:

“Those words do not, in my judgment, amount to an agreement that representations are withdrawn, overridden or of no legal effect so far as any liability for misrepresentation may be concerned. The provision is concerned with the terms of the Agreement. It provides that the Agreement represents the entire understanding and constitutes the whole agreement. It is in that context that the Agreement supersedes any previous representations. That is, representations are superseded and do not become terms of the Agreement unless they are included in the Agreement. If it had

intended to withdraw representations for all purposes then the language would, in my judgment, have had to go further.”

In short, in order to avoid liability for misrepresentation, one has to get to rid of representations as representations; hence the language of ‘no representations’ and ‘non-reliance’. See also the failure of the following wording in the *Axa Sun Life* case:

“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 but this will not affect any obligations in any such prior agreement which are expressed to continue after termination.”

Rix L.J.’s overall conclusion was as follows:

“In context the language of “representations” and “supersede” is the language of defining contractual obligations rather than the language of excluding liability in misrepresentation. There was there, as here, no language to the effect that the parties were agreed that no representations had been made or relied upon.”

## Interpretation

*Rainy Sky SA v Kookmin Bank* [2010] EWCA Civ 582, 130 Con LR 19  
*ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353  
*Barclays plc v HHY Luxembourg SARL* [2010] EWCA Civ 1248  
*Lomas v FJB Firth Rixson* [2010] EWHC 3372 (Ch)  
*Multi-link Leisure Developments Ltd v North Lanarkshire Council* [2010] UKSC 47  
*Pink Floyd Music Ltd v. EMI Records Ltd* [2010] EWCA Civ 1429  
*Crema v Cenkos Securities Plc* [2010] EWCA Civ 1444  
*MGN Ltd v Grisbrook* [2010] EWCA Civ 1399  
*Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2010] UKSC 44

In the *Rainy Sky* case, Kookmin Bank provided a bond in support of a refund guarantee given by the builder as part of six shipbuilding contracts. Under

the shipbuilding contracts, the refund was payable if the claimant exercised its rights of termination or cancellation (under Article 10), but also under Article 12.3 on certain events of insolvency. The claimants sought payment under the bond by reference to Article 12.3 when the builder became subject to a ‘debt work-out procedure’ under Korean law.

The material parts of the bond were as follows:

“[2] Pursuant to the terms of the Contract, you are entitled, upon your rejection of the Vessel in accordance with the terms of the Contract, your termination, cancellation or rescission of the Contract or upon a Total Loss of the Vessel, to repayment of the pre-delivery instalments of the Contract Price paid by you prior to such termination or a Total Loss of the Vessel...

[3] In consideration of your agreement to make the pre-delivery instalments under the Contract and for other good and valuable consideration (the receipt and adequacy of which is hereby acknowledged), we hereby, as primary obligor, irrevocably and unconditionally undertake to pay to you, your successors and assigns, on your first written demand, all such sums due to you under the Contract...

[4] Payment by us under this Bond shall be made without any deductions or withholding, and promptly on receipt by us of a written demand (substantially in the form attached) signed by two of your directors stating that the Builder has failed to fulfil the terms and conditions of the Contract and as a result of such failure, the amount claimed is due to you and specifying in what respects the Builder has so failed and the amount claimed. Such claim and statement shall be accepted by us as evidence for the purposes of this Bond alone that this amount claimed is due to you under the Bond.”

This wording raised two issues. First, whether the bond covered a refund based on an event of insolvency and, second, whether it provided an ‘on-demand’ guarantee. There was no appeal from the first instance decision of Simon J. that the bond amounted to an on-demand guarantee but there was an appeal against his decision that the bond did cover a refund triggered by an event of insolvency.

It had been argued before Simon J. at first instance that the reference to 'all such sums' in clause [3] had to be read back to clause [2] which only referred to a refund payable *on termination, cancellation etc.*, and that this wording was not apt to cover a refund under Article 12.3 which was not predicated on termination, cancellation etc.

This argument was rejected by Simon J., however, on the basis that clause [2] was only a preamble; it was clause [3] which set out the parties' rights and the reference therein to 'all such sums' was more obviously a reference back to the 'pre-delivery instalments' in the same sentence than to clause [2]. There was therefore no limit on the scope of the bond as claimed by the bank. Most pertinently per Simon J.:

"The Defendant's construction has the surprising and uncommercial result that the Buyers would not be able to call on the Bond on the happening of the event which would be most likely to require the First class security."

Two of the Lords Justice in the Court of Appeal found that the arguments of textual analysis were fairly even. Patten LJ placed emphasis on Article X.8 of the shipbuilding contract which stated:

"The refund guarantees by the Builder to the Buyer shall be indicated pre-delivery instalments plus interest as aforesaid to the Buyer under or pursuant to paragraph 5 above in the form annexed hereto as Exhibit A which is yet to be agreed."

The significance of the reference to paragraph 5 is that it only referred to a refund on termination or rescission thus allowing room for the argument that the Bond was in line with the contract and that paragraph (2) was not a mere preamble.

However, Tuckey LJ (dissenting), pointed out, if this is an argument that the contract determined the scope of the bond, it ran into the problem that what it really called for was a bond in the form annexed and yet to be agreed, and nothing had been annexed. If it was an argument that, in the absence of any annexure, Article X.5 of the contract determined the scope of the bond, it did not refer to a refund for 'Total Loss' and it was clear that that was covered by the Bond. Patten LJ thought this gave no 'contrary indication' that the purpose of paragraph 2 was

"to give the addressee of the bond a clear statement of the Builder's obligations under the contract which are to be covered by the guarantee and one which is consistent with

the terms of the Builder's obligations to provide the bond under Article X.8 of the contract."

However, the real difference of opinion came over the role to be played by the 'commerciality' of the competing interpretations. This is captured by the following observations.

First, Tuckey LJ, who shared Simon J.'s view:

"On the Bank's construction the bonds covered each of the situations in which the Buyers were entitled to a return or refund of the advance payments which they had made under the contracts apart from the insolvency of the Builder. No credible commercial reason has been advanced as to why the parties (or the Buyers' financiers) should have agreed to this. On the contrary, it makes no commercial sense. As the judge said, insolvency of the Builder was the situation for which the security of an advance payment bond was most likely to be needed. The importance attached in these contracts to the obligation to refund in the event of insolvency can be seen from the fact that they required the refund to be made immediately. It defies commercial common sense to think that this, among all other such obligations, was the only one which the parties intended should not be secured. Had the parties intended this surprising result I would have expected the contracts and the bonds to have spelt this out clearly but they do not do so."

and Patten LJ, who disagreed:

"Although the judge is right to say that cover for such event was, objectively speaking, desirable, that is not sufficient in itself to justify a departure from what would otherwise be the natural and obvious construction of the bond. There may be any number of reasons why the Builder was unable or unwilling to provide bank cover in the event of its insolvency and why the Buyer was prepared to take the risk. This is not a case in which the construction contended for would produce an absurd or irrational result in the sense described in the cases I have referred to and merely to say that no credible commercial reason has been advanced for the limited scope of the bond does, in my view, put us in real danger of substituting our own judgment of the

commerciality of the transaction for that of those who were actually party to it.”

One could be forgiven for thinking that this represents the nadir of the current approach to contractual interpretation, which has certainly of late taken on a more purposive approach. Apart from the fact that one has two such contrasting approaches from two appellate judges, how does one compare the approach taken by Patten LJ in the present case with the approach of the majority of the Supreme Court in *Sigma Finance*<sup>6</sup> (which does rather seem to have arrived at what it saw as the more commercially reasonable result) and the sort of observations made therein, such as this from Lord Collins:

“In complex documents of the kind in issue there are bound to be ambiguities, infelicities and inconsistencies. An over-literal interpretation of one provision, without regard to the whole may distort or frustrate the commercial purpose.”

Finally, if Tuckey and Patten LJ were in disagreement, how was the appeal resolved in the bank’s favour? The entirety of the Thorpe LJ (a former Family Division judge) judgment is as follows:

“I find myself in the invidious position of expressing a decisive opinion in a field that is completely foreign. With considerable trepidation I support the judgment of Patten LJ. I found that Mr Philipps’ submissions had turned me from my preliminary position that Simon J was right for the reasons he gave. I would allow the appeal for the reasons stated by Patten LJ.”

(Permission was granted for an appeal to the Supreme Court, but it is understood that this case has now been settled)

The decision in *Kookmin Bank* may be contrasted with another decision of the Court of Appeal in *Barclays Bank v HHY Luxembourg*, in which a group of companies provided guarantees in support of a number of Facility Agreements under which loans were made to the group. The benefit of this security was held by a Security Trustee whose powers and duties were set out in the Facilities Agreements and an Inter-Creditor Agreement (ICA).

<sup>6</sup> [2009] UKSC 2, at 35.

Clause 15.2 of the ICA conferred on the Security Trustee the power to release liabilities of members of the Group on certain disposals. This was said to extend to the following:

“...if the asset which is disposed of consists of all of the shares...in the capital of an Obligor or any holding company of that Obligor, any release of the Obligor or any holding company from all liabilities it may have...”

As part of a restructuring it was proposed to sell the shares in a holding company under which stood a number of direct and indirect subsidiaries, some of which provided guarantees and were themselves ‘Obligors’.

The question of interpretation was whether the wording above allowed the Security Trustee to release the liabilities of the holding company and the subsidiaries, or only the holding company. The practical significance of this was that a disposal free of all liabilities would maximise the return on disposal, but it was clear that only the Senior Lenders would benefit from that disposal. Needless to say it was the subordinated creditors who would not benefit who objected to this interpretation. At first instance, Proudman J. held that the Trustee could only release the liabilities of the holding company. This was reversed by the Court of Appeal.

In deference to Proudman J, Longmore LJ held that, at the very least, the ‘natural’ interpretation was even (but actually thought the more natural interpretation was favoured a release of all liabilities). However, if it was even, then the commercially sensible, or the more commercially sensible meaning, should prevail:

“[25]. The matter does not of course rest there because when alternative constructions are available one has to consider which is the more commercially sensible. On this aspect of the matter Mr Zacaroli has all the cards. It is accepted by Mr Knowles that the Security Trustee could, if it had gone through all the right hoops, have sold all the shares of each Obligor separately and thereby become entitled to execute a release of the liabilities of that Obligor. If the words required that exercise to be done, no doubt it would have to be done; but that would not only be an exercise in futility, it would also incur expenditure which would mean that there was even less money for the creditors at the end of the day. Mr Knowles submitted that that was

indeed the bargain and was intended to give the subordinated creditors the opportunity to negotiate with the Priority Senior Creditors if those creditors wanted to find an easier way out of the difficulties of separate sales in separate jurisdictions; but that stands the whole concept of primary creditors and deferred creditors on its head, and is unlikely to have been the intention of the parties to the ICA, which is, after all, intended to be a cooperative document between parties with similar interests, who would want to maximise recovery if at all possible. Moreover, as Jacob LJ pointed out in argument, any one creditor could in any event stymie any such negotiation that Mr Knowles envisages should take place.

[26] The Judge said that it did not flout common sense to say that the clause provided for a very limited level of release, but that, with respect, is not quite the way to look at the matter. If a clause is capable of two meanings, as on any view this clause is, it is quite possible that neither meaning will flout common sense. In such circumstances, it is much more appropriate to adopt the more, rather than the less, commercial construction.”

Some sense that the “purposive” approach may be on the wane and there is now a return to something more literal. This may also be detected in the most recent decision of the Court of Appeal in *ING Bank NV v Ros Roca SA*. Here the claimant bank was entitled to a success fee for finding an investor to make the investment which would allow the defendant to repay a loan used to acquire a business. Under the contract through which the bank was engaged, the fee was to be based in part on “2006 EBITDA” for the defendant, but by the time the transaction was completed, the 2006 figures were no longer current and the defendant argued that the 2007 figures should be used on the basis that what the parties really meant was “current EBITDA” (it is just that they expected the investment to be made when 2006 EBITDA was current). That certainly seemed to be in line with the “purpose” of the formula used. The 2007 EBITDA produced a much lower fee. The Court of Appeal rejected that submission as a *matter of interpretation*.

According to Rix L.J. the distinction which the courts have to be wary of is that between a contract which “carries its own error within its own terms, as understood in context” where a purposive interpretation is permissible even to the extent of correcting the language used, and a contract which

“will work perfectly sensibly in the context in which it was made, but it contains a flaw in that it does not provide for all eventualities”. In relation to the latter it is not for the courts to remake the contract “on the basis of what the courts consider would have been reasonable, or more sensible, for the contract to have said”. This is no easy distinction to draw, as is demonstrated by the *Kookmin Bank* case discussed above.

But what is rather perplexing about the decision in the *ING Bank* case is that the defendant still succeeded in arguing for the lower figure on the basis of estoppel, on the basis of exchanges between the parties about the likely estimate of the fee which would be payable, which estimates were not consistent with the use of 2006 EBITDA. The perplexing feature is that the bank’s role in these exchanges was largely to keep quiet about its view that the figure might in fact be much higher. The CA found there was “a duty to speak” sufficient to found the necessary estoppel which prevented the bank from asserting its entitlement to the higher figure under the contract, as interpreted.

Two recent cases have dealt in part with the extent to which expert evidence is admissible for the purpose of interpretation. In the *Pink Floyd* case, the Court of Appeal held that it may be admitted to establish what the parties knew or believed at the time of the contract. In the *Cenkos* case, the Court of Appeal held that expert evidence of ‘market practice’ falling short of trade usage or custom (which may give rise to an implied term) is admissible for the purpose of ascertaining and interpreting the terms of an agreement. In *Cenkos*, on whether payment of commission to a sub-broker is conditional on payment having been received by the broker. There was found to be no relevant market practice and, overall, no basis for so restricting the sub-broker’s entitlement payment.

A settlement agreement is subject to the same principles of interpretation which are applied to contracts generally, including the rule excluding evidence of negotiations was recently confirmed in *Chartbrook Ltd v. Persimmon Homes Ltd* (2009) UKHL 38, (2009) 1 AC 1101. But does the status of those negotiations as being ‘without prejudice’ provide a further bar to admissibility? It seems not.

In *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* the Supreme Court held that without prejudice negotiations are admissible as an aid to the interpretation of a settlement agreement, provided they are admissible at all in accordance with the rules laid down in *Chartbrook*, for example, the

negotiations establish objective facts that were known to the parties.

### The *Contra Proferentem* Rule

*KG Bominflot v Petroplus* [2010] EWCA Civ 1145

*Contra proferentem* continues to apply to the interpretation of exemption clauses, but it does seem to be coming under pressure. In *KG Bominflot v Petroplus*, one of the issues for the Court of Appeal was whether a clause in the following terms was sufficiently clearly worded to exclude the implied term under section 14(2) of the Sale of Goods Act 1979 that the goods should be of satisfactory quality:

“There are no guarantees, warranties or representations, express or implied, [of] merchantability, fitness or suitability of the oil for any particular purpose or otherwise, which extend beyond the description of the oil set forth in this agreement.”

The argument that says this wording does not succeed is based on the fact that where the terms implied by the Sale of Goods Act are implied as conditions (i.e terms the breach of which entitle the claimant not only to claim damages but to terminate the contract and reject the goods), as is the case with s.14(2), nothing less than an explicit reference to ‘conditions’ will suffice.

If he was free from the constraints of previous authority, it is clear that Rix LJ would have considered this too narrow an approach and that the wording employed sufficient to indicate the parties’ intention to exclude liability under s.14(2). However, he was constrained by a line of cases<sup>7</sup> which had established as a general principle that liability for breach of a condition could only be excluded by a reference to ‘conditions’. The clause therefore failed as a matter of construction.

### Letters of Intent/‘Subject to Contract’ and Contract Formation

*RTS Flexible Systems Ltd v Molkerei Alois Muller GbmH* [2010] UKSC 14, [2010] 1 WLR 753  
*Investec Bank Ltd v Zulman* [2010] EWCA Civ 536

<sup>7</sup> Most notably *Wallis, Son & Wells v. Pratt & Haynes* [1911] AC 394 and *Henry Kendall & Sons v. William Lillico & Sons* [1969] 2 AC 31

We should be wary of reading too much into any decision on whether the parties have moved beyond the stage of negotiation, or a letter of intent, to a full blown contract since, as Lord Walker emphasised in the *Muller* case, each case will depend on its own facts.<sup>8</sup>

In the *Muller* case, work had begun on the supply and installation of automated packaging under a letter of intent. When the four week term of that letter of intent had expired and work continued, the question was whether it did so on the basis of a contract. The principal argument against the existence of a contract was that the parties negotiated on the basis that it would be governed by Muller’s standard terms (the MF\1 Form of Contract), clause 48.1 of which stated:

“This Contract may be executed in any number of counterparts provided that its shall not become effective until each party has executed a counterpart and exchanged it with the other.”

As noted by Lord Walker, it is no easy thing to argue that a contract has been formed in the face of a ‘subject to contract’ clause:

“Whether in such a case the parties agreed to enter into a binding contract, waiving reliance on the ‘subject to [written] contract’ term or understanding will again depend upon all the circumstances of the case, although the cases show that the court will not lightly so hold.”

Nonetheless, the Supreme Court found that this was a case where the parties had waived reliance on ‘subject to contract’, particularly because they had reached agreement on all the terms that were essential and work had been carried out:

“The clear inference is that the parties had agreed to waive the subject to contract clause, viz clause 48. Any other conclusion makes no commercial sense. RTS could surely not have refused to perform the contract as varied pending a formal contract being signed and exchanged. Nobody suggested that it could and, of

<sup>8</sup> At 54. One might contrast the decision in the *Muller* case that there was a contract with the decision of the Court of Appeal in *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189 that there was not, and the claimant was left with a claim in unjust enrichment. There, the court found that crucially important terms were still under negotiation.

course, it did not. If one applies the standard of the reasonable, honest businessman suggested by Steyn LJ, we conclude that, whether he was an RTS man or a Muller man, he would have concluded that the parties intended that the work should be carried out for the agreed price on the agreed terms, including the terms as varied by the agreement of 25 August, without the necessity for a formal written agreement, which had been overtaken by events.”

By contrast, in the *Investec* case the parties were found to have reached oral agreement on an amended guarantee, but even in the absence of any express ‘subject to contract’ provision, it was found that they did not intend to be bound until the formal written guarantee had been signed. Always a question of taking into account all of the circumstances, but the surest guides to the parties’ intentions are usually the terms of the draft documents passing between them. Thus, in *Investec* a provision that the guarantors should first take independent legal advice before signing made no sense if the guarantors were already bound before signing.

## Penalties

*Azimut-Benetti SpA v Healey* [2010] EWHC 2234 (Comm)

In *Azimut-Benetti* in a contract for the construction of a yacht, the court upheld a liquidated damages clause of 20 per cent of the full contract price and did so very much in line with the current trend of looking to the commercial justification of the figure. The contract was supported by a guarantee under which ‘the liability of the guarantor was not to be “impaired, diminished, discharged or released by reason or in consequence of ... the irregularity, illegality, unenforceability or invalidity in whole or in part of the Yacht Construction Contract”’. The court rejected an argument that if the clause had been a penalty it could nonetheless have been enforced against the guarantor.

Blair J. put it this way:

“It is correct that by clear drafting a guarantor’s liability may be other than coextensive with that of the principal debtor, but I do not think that clause 2(f) (a standard clause in guarantee contracts) would be apt to impose on a guarantor a liability for a sum that is irrecoverable

against the principal debtor where the reason for it being irrecoverable is that the sum in question is a penalty. The rule against penalties is ultimately based on public policy. In this regard, I would follow the decision of Clarke J in *Citicorp Australia Ltd v Hendry* (1985) 4 NSWLR 1 at p.21D, a New South Wales case. He held, and I agree, that it would be contrary to principle to allow the indirect enforcement of a claim for a penalty in this manner.”

He also said that the argument failed for another reason. The guarantee covered “all of the Buyer’s obligations under or pursuant to the Yacht Construction Contract or arising out of any breach or termination thereof”. If the liquidated damages clause was a penalty, it did not give rise to an obligation:

“Since the Guarantee is limited to the “obligations” of Shoreacres, if Shoreacres has no obligation under the contract, the defendant has no obligation under the Guarantee.”

The second reason is a matter of construction and might be dealt with by appropriate drafting. The first reads as though it is an absolute bar on making a penalty enforceable by claiming under even an appropriately worded guarantee.

## ‘True and Fair’ Warranties

*MacQuarie v Glencore* [2010] EWCA Civ 697

*MacQuarie* is the latest consideration by the courts of the interpretation of a warranty in sale and purchase agreements to the effect that the accounts give a true and fair view.

The case involved the sale of the entire share capital of Corona, a gas supply group. Entirely unknown to the sellers, because of an error by a third party (X) shipping charges did not appear in the accounts or the management accounts. If they had been known, the sale price would have been £2.4m lower.

C sued for breach of the following warranties:

“4.1 Accounts

The Accounts:

- (a) have been prepared in accordance with Relevant Accounting Standards and in a manner consistent with that adopted in the

preparation of the annual accounts of the Group and/or the Company or Subsidiary to which they relate (as the case may be) for the Financial Years ended 31 December 2003 and 31 December 2004;

- (b) give a true and fair view of the assets and liabilities of the Group and/or the Company or the Subsidiary to which they relate as at the Accounts Date and the profits and losses of the Group and/or the Company or the Subsidiary to which they relate (as the case may be) for the Financial Year ended on the Accounts Date (including all related party transactions);
- (c) comply with the requirements of the Companies Act;
- (d) make appropriate provision for or note or otherwise disclose all material actual liabilities and all material contingent, deferred and disputed liabilities (including, in each case, Taxation liabilities) (whether liquidated or unliquidated) and all outstanding capital commitments of which the Group and/or Company or Subsidiary to which they relate was aware as at the Accounts Date and in respect of which disclosure or provision is required under Relevant Accounting Standards;

and

- (e) make adequate provision for debts then known or believed to be bad or doubtful.

#### 4.2 Management Accounts

The Management Accounts have been diligently prepared in accordance with Relevant Accounting Standards and in a manner consistent with that adopted in the preparation of the management accounts of the Group for each month during the twelve months prior to the Accounts Date. On the basis of the accounting bases, practices and policies used in their preparation and having regard to the purpose for which they were prepared, the Management Accounts:

- (a) fairly reflect the financial position of the Group as at 30 June 2006;
- (b) fairly reflect the cash and working capital position of the Group as at 30 June 2006; and
- (c) are not misleading in any material respect.”

The Court of Appeal upheld the decision of Andrew Smith J. that none of the warranties had been breached.

So far as the Accounts warranty was concerned, the Court adopted the view that, barring exceptional circumstances, accounts prepared in accordance with the relevant accounting standards give a true and fair view:

“There are no exceptional circumstances in the present case which would have led to the conclusion that the draft audited accounts, despite being prepared in accordance with the relevant accounting standards, did not give a true and fair view of the assets and liabilities. The Group did not know about and could not reasonably have discovered the missed meters charge at the relevant time. Furthermore, it cannot be said that the Group or its accountants made an “error” within the meaning of paragraph 63 of FRS 3, which required or permitted the accounts for the year ended 31st December 2005 to be reopened or restated.”

Furthermore, paragraph 4.1(d) contained a specific warranty as to liabilities shown in the accounts, which was expressly limited by reference to those of which the relevant company was aware as at the Accounts Date and for which disclosure or provision was required. As Jackson LJ noted:

“it would be surprising if the existence of an unknown liability, not covered by that warranty, was a breach of the more general warranty in paragraph 4.1(b).”

So far as the Management Accounts warranty was concerned and whether they were ‘misleading’ in not disclosing the charge, the Court rejected the submission of Court that ‘misleading’ had to be read from the perspective of the purchaser and not from the perspective of an accountant; the point being that a purchaser would certainly regard an undisclosed liability as misleading even if it could not have been picked up by adhering to the relevant accounting standards. In rejecting this approach, the court agreed that it might render the second sentence of clause 4.2 surplus:

“When one sets, and then interprets, warranty (c) in its contractual context, it can be seen that it is not concerned with the management accounts showing a misleading picture by reference to information which comes to light after 30 June 2006 and which materially affects the retrospectively assessed

commercial net asset value of Corona as at that date. What the warranty is directed to is any materially misleading aspects of the Management Accounts, assessed on a conventional accounting basis, as at 30 June 2006.”

## Damages for Fraudulent Misrepresentation

*Parabola Investments Ltd v Browallia Call Ltd* [2010] EWCA Civ 486

An obvious point perhaps, is that the courts do not like fraudsters. In terms of damages, this manifests itself in the principle that there is no remoteness limit as such to claims in fraud; the claimant may recover as damages all losses which were a direct consequence of the fraud. In what is a claim in tort, that may include damages for loss of profit, but it is not the profit that the claimant expected to make from the contract he was induced to enter by the fraud, it is the profit he would have made had he not tied up his capital in the contract with the fraudster.

The recovery of this head of damages was established some time ago,<sup>9</sup> but the decision in *Parabola* is a rather vivid illustration of how far the courts may be prepared to go in its application. In simple terms, C traded in CFDs for a period of eight months, because of the fraudulent misrepresentation of his broker, D, that the trading was profitable when, in fact, it was disastrously loss making. C was awarded not only the capital element of the losses run up in the trading period, but the profits he claimed he would have made had he been able to invest that capital element in other trades, and not only for the trading period in 2001-2002, but also right up to the date of the trial in 2009 (the ‘profits on profits’ claim).

This type of claim, while not subject to the test of remoteness, is nonetheless speculative and in some cases it has been found to be too speculative to be recovered. It is also significant that in the *Parabola* case, C could point to the fact that he had been a successful profit-making trader both before and after the fraudulently induced trading with D. On the ‘standard of proof generally, Flaux J. at first instance had observed:

“...where, on a balance of probabilities, the court concludes that some profits would

<sup>9</sup> See, most notably, *East v Maurer* [1991] 1 WLR 461 and *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd* [2001] QB 488.

have been made from an alternative transaction or transactions, which the claimant would have entered but for the fraud, then the court can and should award damages for such loss of profits, if necessary discounting the amount recovered to reflect the element of risk (as appears to have happened in *East v Maurer*). There is simply no added requirement before such damages are recoverable that the alternative transactions(s) be shown to be “necessarily profitable”.

His decision was upheld on appeal, *per* Toulson LJ, in the following terms:

“The appellants have not shown any principled reason why the discovery of the fraud should be taken as a legal cut off point terminating Tangent’s claim for damages in respect of its loss of investment opportunity, resulting from the appellant’s fraud. Applying the fundamental compensatory principle, the judge was right to hold for the reasons he did that Tangent was entitled in principle to recover damages in respect of such loss until the trial.”

However, two important provisos for those who may be thinking of any wider applications of this approach. First, it may have been a case of fraud, where there is a greater willingness of the courts to speculate on behalf of the claimant, but there is a limit to that speculation. Thus:

“The distinctive feature of the case in relation to his trading on the London Stock Exchange was that he had a remarkable track record both before and after the Man period. Claimants who advance speculative and unmeritorious consequential loss claims face the risk of having to pay the costs of those claims as well as the risk of damaging their credibility more generally.”

Second, the duty to mitigate may require the borrowing of the depleted fund and the recovery only of the costs of borrowing:

“Where a claim is made for loss of use of money on an alternative investment after the discovery of the fraud, a fair measurement of the loss might in some cases be the cost of replenishing the depleted fund, i.e., the cost of borrowing the necessary funds to make the investment, if that possibility was

reasonably open to the claimant. (There would be a parallel between that and the measure claimed and allowed in *Hungerfords*.) However, the question whether that possibility was reasonably open to Tangent was never explored, and there was no argument at the trial or on the appeal that this would have been a better way of measuring damages for Tangent's loss of investment opportunity at stage 2. The issue of law was whether damages for that loss of investment opportunity were recoverable at all."

## The Unfair Contract Terms Act

*Axa Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133

D became the appointed representatives of C under a standard form agreement. On termination, C sought recovery of the balance of certain business development allowances which had been paid to D and commission claw-back. D alleged that it had claims for breach of implied terms, collateral warranties, and in misrepresentation. In relation to such claims, both the scope of certain terms of the agreement and their effect under UCTA came into play. Those terms and the decisions reached in relation to them were as follows:

Clause 24 stated as follows:

"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 but this will not affect any obligations in any such prior agreement which are expressed to continue after termination."

For the reasons given above, it failed as a matter of construction to exclude any liability for pre-contractual misrepresentation. It was also held not to exclude any claim for breach of the alleged implied terms. Those implied terms were: (i) that C would process all business submitted to it by D with reasonable care and without any unreasonable delay; (ii) C would ensure that its computer

processes operated efficiently so as to facilitate the completion of business submitted without unreasonable delay; and (iii) C would not unreasonably delay or unreasonably refuse or fail to approve the appointment of suitable company representatives recruited by D. Of those, Burnton LJ stated as follows:

"...It is apparent...that the Defendants allege that they are to be implied in order to give business efficacy to the Agreements. In other words, the implied terms are said to be intrinsic to the Agreements, and true implications. In my judgment, 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" in the first sentence, and they are not "prior" to the Agreement, and therefore are unaffected by the second sentence. The Agreement might have included, but does not include, an express specific exclusion of such implied terms.

On the other hand, terms that might be implied as a result of matters extrinsic to the written Agreements would, in my view, be excluded by clause 24."

Burnton L.J. does not elaborate on what is meant by "terms that might be implied as a result of matters extrinsic to the written Agreements". The view of Lord Hoffmann in *Att-Gen of Belize v Belize Telecom Ltd* [2009] UKPC 10, at 18, in relation to implied terms in fact is that the implication of the term is not an addition to the instrument. It only spells out what the instrument means. That would seem to suggest that all terms implied *in fact*, are 'intrinsic' to the Agreement and are not excluded by an entire agreement clause.

To the extent that clause 24 excluded any collateral warranties and if it excluded any implied terms, it was found to be subject to the test of reasonableness under UCTA by virtue of Section 3(2)(b)(i) which states that a party cannot by reference to any term 'claim to be entitled to render a contractual performance substantially different from that which was reasonably expected of him. The scope of this provision is not easy to determine, but according to Burnton J:

"in appropriate circumstances a pre-contractual representation or promise may affect the performance that is reasonably expected of a party.

Nevertheless, clause 24 was found to be reasonable on the basis of a number of factors: (i) the parties were both commercial organisations; (ii) the representatives had or should have read what were standard industry terms; (iii) they had a choice in that they could have set up as independent financial advisers not subject to such terms, but the regulatory cost of doing so would have been for them and not C; (iv) the need for the certainty that an entire agreement clause is meant to provide.

Clause 1.6 stated as follows:

“A statement or certificate signed by or on behalf of us as to all or any part of the Monies due to us from you under the terms of this Schedule shall, save for manifest error, be final and conclusive and binding on you.”

There was no reason not to give this long standing type of clause effect according to its terms, but it was said to be subject to the test of reasonableness under UCTA since it had the effect of excluding D's right of set-off and thereby reducing the sum due from D to C. No provision of UCTA was referred to, but this may have been a reference to s.13(1)(b) which extends the controls in the Act to terms which exclude or restrict 'any right or remedy in respect of liability.

However, precisely because any statement could be challenged for 'manifest error', clause 1.6 was found to be reasonable.”

Clause 15.2 stated as follows:

“All Monies payable by you to us under this Agreement shall be paid in full without any deduction or withholding other than as required by law and you will not (and renounce any right you may have to) assert any credit, set-off or counterclaim against us to justify withholding payment of any such Money or amount in whole or in part.”

Again, the Court of Appeal held that there was no reason not to give effect to the clause on its terms, the principal effect of such a provision being that it removes any defence to C's claim and confines D to pursuing its claims by way of separate proceedings (and there should be no stay of C's judgment pending determination of those separate proceedings)

Such clauses are caught by UCTA (again s.13(1)(b)) and this clause was found to be unreasonable because there was no explanation of (C's)

requirement for this clause This is unusual. In the earlier case of *Gill v Myer* [1992] 1 QB 600 a no set-off clause was held to be unreasonable when it was expressed in the following terms:

“The Customer shall not be entitled to withhold payment of any amount due to the Company under the Contract by reason of any payment credit set off counterclaim allegation of incorrect or defective Goods or for any other reason whatsoever which the Customer may allege excuses him from performing his obligations hereunder.”

It was unreasonable because of the references to 'payment' and 'credit' and this rendered the clause as a whole unenforceable, whether or not the exclusion of set-off was reasonable. But in another case, the exclusion of set-off itself has been held to be reasonable.<sup>10</sup> It may be that clause 15.2 in the present case was unreasonable because it too included a reference not only to 'set-off' but also to any 'credit'.

■ ■ ■

This update was written by Martin Day (+44 20 7184 7564; martin.day@dechert.com) based on a lecture delivered in June 2011 by Edwin Peel, Fellow of Keble College and Lecturer in Law at the University of Oxford.

<sup>10</sup> *Schenkers v. Overland Shoes Ltd* [1998] 1 Lloyds Rep 498 CA

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## Practice group contacts

For more information, please contact the author, one of the attorneys listed, or any Dechert attorney with whom you regularly work. Visit us at [www.dechert.com/financial\\_services](http://www.dechert.com/financial_services).

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**Karen L. Anderberg**

London  
+44 20 7184 7313  
karen.anderberg@dechert.com

**John Gordon**

London  
+44 20 7184 7524  
john.gordon@dechert.com

**Declan O'Sullivan**

Dublin  
+353 1 436 8510  
declan.osullivan@dechert.com

**Peter D. Astleford**

London  
+44 20 7184 7860  
peter.astleford@dechert.com

**Andrew Hougie**

London  
+44 20 7184 7373  
andrew.hougie@dechert.com

**Achim Pütz**

Munich  
+49 89 21 21 63 34  
achim.puetz@dechert.com

**Gus Black**

London  
+44 20 7184 7380  
gus.black@dechert.com

**Angelo Lercara**

Munich  
+49 89 21 21 63 22  
angelo.lercara@dechert.com

**Marc Seimetz**

Luxembourg  
+352 45 62 62 23  
marc.seimetz@dechert.com

**Martin Day**

London  
+44 20 7184 7565  
martin.day@dechert.com

**Angelyn Lim**

Hong Kong  
+852 3518 4718  
angelyn.lim@dechert.com

**Hans Stamm**

Munich  
+49 89 21 21 63 42  
hans.stamm@dechert.com

**Peter Draper**

London  
+44 20 7184 7614  
peter.draper@dechert.com

**Stuart Martin**

London  
+44 20 7184 7542  
stuart.martin@dechert.com

**James M. Waddington**

London  
+44 20 7184 7645  
james.waddington@dechert.com

**Olivier Dumas**

Paris  
+33 1 57 57 80 09  
olivier.dumas@dechert.com

**Michelle Moran**

Dublin  
+353 1 436 8511  
michelle.moran@dechert.com

**Jennifer Wood**

London  
+44 20 7184 7403  
jennifer.wood@dechert.com

**Richard Frase**

London  
+44 20 7184 7692  
richard.frase@dechert.com

**Antonios Nezeritis**

Luxembourg  
+352 45 62 62 27  
antonios.nezeritis@dechert.com

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