

To: Our Clients and Friends

29 March, 2012

## The English High Court takes a commercial approach to the interpretation of entire agreement clauses

Bryan Cave achieved a significant win for its Bulgarian and Luxembourg clients in a commercial dispute in the English High Court, signalling a commercial approach to the interpretation of entire agreement clauses seeking to limit or exclude liability for misrepresentation. This important case will be welcomed by commercial parties seeking contractual certainty of the risks and liabilities they take on when entering commercial agreements.

The Court handed down its decision in favour of Bryan Cave's client on 15 March 2012 striking out a misrepresentation claim worth in excess of €8.5 million, following a one-day Commercial Court hearing in London before Mr. Justice Peregrine Simon.

### Summary

This decision cuts through swathes of case law in this area, which previously approached the interpretation of entire agreement clauses in overly complicated and often conflicting ways. It is a good example of the Commercial Court again taking a commercial approach to commercial disputes, ensuring that its judgments are consistent with business common sense. The Commercial Court applied a commercial construction of the clauses, and refused to allow the defendant to bypass or undermine the contractual allocation of risk and reward simply by reframing its claim in misrepresentation rather than for breach of contract.

The decision does not eliminate the need for careful drafting of entire agreement and limitation clauses. Such clauses are frequently the subject of legal disputes and careful drafting can prevent disputes arising, or halt such disputes at an early stage of the proceedings.

The case also highlights the benefit of including in commercial agreements carefully chosen provisions as to the governing law and jurisdiction that will preside over disputes. In this instance, the dispute had no apparent connection to England - the shares sold were in a Bulgarian company, the parties were Serbian, Bulgarian and Luxembourg, all losses were incurred outside of England, and the acts complained of all took place outside of England. The dispute came before the English Commercial Court only because the parties had expressly agreed that disputes would be subject to the jurisdiction of the English Courts and that the agreement would be governed by English law.

Absent such an agreement, the dispute would have come instead before the Bulgarian Courts, where such a speedy, commercial resolution would have been highly unlikely.

## The Case

The Commercial Court had the opportunity to examine the correct approach to the interpretation of clauses in commercial agreements which seek to exclude or limit liability for misrepresentations.

The parties had entered into a share purchase agreement (the "SPA") for the sale of shares in a Bulgarian satellite broadcasting company. The total price was payable in two tranches. The Buyer paid the first tranche, but failed to pay the second, in excess of €4 million. Bryan Cave's clients, the Sellers, brought an action in the Commercial Court for recovery of the second tranche. The Buyer counterclaimed, seeking damages for breaches of warranties given in the SPA, and also damages for misrepresentations exceeding €8.5 million.

Warranty claims were capped by the SPA at the full amount of the purchase price. The misrepresentation claim on the other hand was not, the Buyer said, subject to that cap. On the Buyer's case it was entitled to recover, for misrepresentations made before the SPA was signed, its full damages assessed on the tortious basis which would include not only the price paid for the Sellers' shares, but also the price it paid for other shares in the same company bought from other sellers, as well as the lost investment made by the Buyer into the company after the sale. The misrepresentation claim therefore far exceeded the contractual cap (by some €3.5 million).

The SPA contained a standard form of entire agreement provision to the effect that the SPA superseded all prior agreements and understandings. It is well established law in England that whilst this might exclude for example collateral contracts, it does not exclude misrepresentations. The SPA also contained the following provision: *"Each party waives its rights against the other in respect of warranties and representations (whether written or oral) not expressly set out in this agreement."* The Sellers relied on this provision as excluding any claim arising out of pre-contract misrepresentations and they therefore applied to the Court to strike out the Buyer's counterclaim for misrepresentation. The Buyer argued that to the extent that the misrepresentations alleged were in relation to matters repeated in the warranties set out in the SPA, their claim could be maintained - the difference being, the Buyer said, that s.2(1) of the Misrepresentation Act 1967 required an element of culpability on the part of the Sellers, and that that justified the parties' intentions to treat the two types of claim differently.

Following a full day of argument the Commercial Court applied a commercial construction of the relevant clauses of the SPA. Mr. Justice Simon found that the entire agreement provisions in the SPA involved a calculated allocation of risk and remuneration. If the Buyer's submissions were correct, the allocation of the Sellers' risk and reward would depend on the way in which the Buyer framed its cause of action. The Court refused to allow a party to bypass or undermine that contractual allocation simply by reframing its claim in misrepresentation. Accordingly, Mr. Justice Simon found for the Sellers, and the Buyer's counterclaim in misrepresentation was struck out in full. The Buyer was ordered to pay the Sellers' attorneys' fees. Mr. Justice Simon went on to state that, although it was no longer necessary to decide whether the limitation clause would apply, if he'd had to decide the point, he would have found that the contractual limitation of liability also applied to the misrepresentation claim. In obiter, Mr. Justice Simon also stated that it was

*“doubtful that a representation which only appears in a contract can fall within the terms of s.2(1) of the Misrepresentation Act 1967 in the light of the wording of the statute”* however he considered it unnecessary to decide the point. This follows the (also obiter) reasoning in *Leofelis and another v. Lonsdale Sports Ltd and others* [2008] EWCA Civ 640.

Bryan Cave Partner [Mathew Rea](#) and Associate [Cara Dowling](#) acted for the Claimants, with [Chirag Karia](#) of Quadrant Chambers appearing as Counsel.

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Neutral Citation Number: [2012] EWHC 621 (Comm)

Case No: 2011 FOLIO 888

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 15 March 2012

**Before: Mr Justice Simon**

**Between :**

**(1) Bikam OOD** **Claimants**  
**(2) Central Investment Group SA**

**and**

**Adria Cable S.a.r.l.** **Defendant**

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**Mr Chirag Karia** (instructed by **Bryan Cave**) for the **Claimants**

**Mr Daniel Toledano QC** and **Mr Adam Rushworth** (instructed by **Freshfields Bruckhaus Deringer**) for the **Defendant**

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Hearing date: 28 February 2012

## **Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE SIMON

**Mr Justice Simon:**

### **Introduction**

1. This is the Claimants' application to strike out paragraphs 33-39 of the counterclaim pursuant to CPR Part 3.4(2)(a) or for summary judgment under CPR Part 24 in relation to these paragraphs (point 1) or alternatively a declaration that the Defendant's counterclaim is subject to a contractual limitation of liability (point 2).

### **The facts**

2. The parties entered into a Share Purchase Agreement ('the SPA') dated 7 October 2009 by which the Claimants agreed to sell and the Defendant agreed to buy a 68.5% shareholding in a Bulgarian company, Interactivni Technologii AD, which provided direct to home satellite broadcasting in Bulgaria. The total price was €6,450,000 (subject to post completion adjustments), which was to be payable in 2 tranches. Tranche 1 (€850,000) was payable on completion, and tranche 2 (€5,600,000, subject to adjustment) was payable within 30 days of the sale of the shares to a third party.
3. It is common ground that the Defendant paid the first tranche, and sold the shares to a third party on 8 November 2010, thereby triggering the obligation to pay the second tranche.
4. The Defendant contends that the circumstances of the sale throw a startling light on the value of the shareholding which it had acquired just over a year earlier. Despite a cash injection of almost €7m, the shareholding (and other shares which it subsequently acquired) were sold for less than €1.
5. On 22 July 2011, the Claimants began proceedings for the recovery of the second tranche.
6. By its Defence, the Defendant has admitted the debt, but relies on a counterclaim (which includes a claim for damages for misrepresentation under s.2(1) of the Misrepresentation Act 1967). So far as material to the present application, its case is that the Claimants made a number of representations which were not true, that the Defendant was induced by those representations to enter into the SPA and that it is entitled to damages on a basis which is not confined by the contractual cap on recoverable damages.
7. The Claimants deny any breach of contract or misrepresentations and contend that the bringing of a claim for misrepresentation is precluded by the terms of the SPA, and for this reason bring the present application.

### **The SPA**

8. The SPA, which was governed by English Law (clause 22) and was subject to the exclusive jurisdiction of the English Courts (clause 23), contained a number of warranties given by the Sellers and the Buyer. The 'Sellers' Warranties' were defined in Clause 1.1 of the SPA:

'Sellers' Warranties' means the representations and warranties of the Sellers contained in Schedule 2 ...

9. Clause 7 dealt specifically with ‘Sellers’ Warranties’:

7.1 Each of the Sellers represents and warrants to the Buyer that each Sellers’ Warranty is true and accurate as at the date of the Agreement and as at Completion [7 October 2009].

...

7.3 The Sellers acknowledge that the Buyer is entering into this Agreement in reliance upon the Sellers’ Warranties.

10. Clause 8 dealt with ‘Buyer’s Warranties’ in similar terms. The Buyer’s Warranties were set out in Schedule 1 of the SPA.

11. Clause 9 was headed ‘Indemnification’:

9.1 From and after the date of this Agreement, and subject to the provisions of this Clause 9, the Sellers shall indemnify fully and hold harmless the Buyer from and against any and all claims, liabilities, damages, penalties, judgments, assessments, losses, costs and expenses (including, but not limited to, legal fees but excluding lost profits or other consequential damages incurred by the Buyer, the Company or their respective Affiliates) (collectively, ‘Damages’) arising out of:

9.1.1 any breach of any Sellers’ Warranty; and

9.1.2 any breach of any covenant or agreement of a Seller set out in this Agreement.

...

9.3 Subject to Clause 9.4, the Indemnifying Party shall not be required to indemnify the Indemnified Party for any Damages arising under this Clause 9, except:

9.3.1 where the Damages relating to an individual claim exceed Euro 20,000 (twenty thousand);

9.3.2 where the aggregate amount of Damages for which the Indemnified Party is entitled to indemnification pursuant to this Clause exceeds Euro 75,000 (seventy five thousand), in which event the Indemnifying Party shall be liable for the full amount of the Damages; and

9.3.3 where the aggregate amount payable with respect to all claims by the Buyer for indemnification from the Sellers shall not exceed the amount which is equal to the aggregate of the Tranche 1 Purchase Price and the Tranche 2 Purchase Price.

...

9.10 The Buyer acknowledges and agrees that its sole remedy against Sellers for any breach of the Sellers' Warranties is set out in this Clause 9 and that, except to the extent that the Buyer has asserted a claim for indemnification prior to the relevant Liability Termination Date, the Buyer shall have no remedy against the Sellers for any breach of the Sellers' Warranties.

12. Clause 17 dealt with 'Cumulative Rights and Remedies':

The rights, powers and remedies provided in this Agreement are cumulative and not exclusive of any rights and remedies provided by law and no single or partial exercise of any right or remedy under this Agreement or provided by law shall hinder or prevent further exercise of such or other rights or remedies.

13. Clause 21 provided, under the heading, 'Entire Agreement':

21.1 This Agreement (together with all the documents to be entered into under it) contains the complete agreement between the parties on the matters to which it relates, and supersedes all prior agreements and understandings (whether written or oral) between the parties in respect of such matters.

21.2 Each party waives its rights against the other in respect of warranties and representations (whether written or oral) not expressly set out in this Agreement.

21.3 Nothing in this Clause 21 limits or excludes the liability of any party for fraud or wilful misconduct.

**The Defendant (Buyer's) case**

14. The relevant part of the counterclaim for misrepresentation is contained in a few short paragraphs of the Defence:

33. Prior to the conclusion of the SPA, the Sellers represented to Adria, in order to induce Adria to enter into the SPA, that the representations set out in paragraph 18 above ('the Relevant Representations') were true and accurate as at the date of the SPA and as at Completion.

34. The Relevant Representations were false, for the reasons set out in paragraphs 23 to 32 above.

35. Adria entered into the SPA in reliance on the Relevant Representations, as stated in clause 7.3

36. As a result of the Sellers' misrepresentations, Adria has suffered loss and damage.

...

39. Adria's claim in relation to the Relevant Representations is therefore approximately EUR 8,578,999.05. Adria is entitled to and claims damages in this amount under section 2(1) of the Misrepresentation Act 1967.

The 'Relevant Representations' were those set out in Schedule 2 of the SPA.

15. The Defendant contends in its counterclaim that the representations in Schedule 2 were made by Claimants' representatives to the Defendant's representatives in the course of exchanging drafts of the SPA, by email and in the course of a meeting between the parties on 7 October 2009, as well as in Schedule 2 itself.
16. It is unnecessary for present purposes to set out all the particular ways in which it is said they were false and inaccurate because the arguments on this application relate not to the facts but to the construction of the contract. However, and by way of illustration, one of the allegations relates to paragraphs 1 and 20 of the Schedule 2 'Sellers' Warranties'.
17. Paragraphs 1 and 20 provided:

1. General

The information disclosed in the Due Diligence Documents is in all material respects true and correct, and such information fairly presents the legal and financial situation of the Company. All material facts about, or circumstances, relating to, the assets, business or financial condition of the Company have been fairly disclosed in the Due Diligence Documents.

...

20. DTH [Direct to Home] Subscribers

(a) for the purposes of this paragraph 20, 'DTH subscribers' means Subscribers who have contracted directly or indirectly with the Company to subscribe to the lowest package of the Company ...

(b) As at the date hereof, there are a total of at least 80,000 DTH Subscribers.

18. In Paragraph 24 of the Defence the Buyer has pleaded that in breach of the Sellers' Warranties there were approximately 65,000 or fewer DTH Subscribers
19. In addition to the plea of misrepresentation as set out above, at paragraph 40 of the counterclaim the Buyer pleads that the facts relied on constituted breaches of the Schedule 2 'Sellers' Warranties'.
20. The Sellers deny there has been any breach of the Sellers' Warranties and, as already noted, contend that the case advanced under the Misrepresentation Act 1967 is an

illegitimate means of getting around the parties' agreement that claims are confined to breach of the Sellers' Warranties and by the terms of Clause 9.3.3. They point out that the Buyer's counterclaim of over €12m (€8.5m claimed as damages and €4.2m, being the unpaid amount of tranche 2) is very much more than the purchase price.

### **The Defendant's (Buyer's) argument**

21. On the first point Mr Toledano QC (for the Buyer) relied on the principles that exclusion clauses (i.e. contractual provisions which exclude or limit liability) should be construed strictly, and that any ambiguity should be construed against the party relying on the clause.
22. He also relied on the general rule that clear words are required to exclude or restrict liability for misrepresentation, see for example Jacob J in *Thomas Witter Ltd v. TBP Industries Ltd* [1996] 2 All ER 573 at 596:

Unless it is manifestly made clear that a purchaser has agreed only to have a remedy for breach of warranty I am not disposed to think that a contractual term said to have this effect by a roundabout route does indeed do so. In other words, if a clause is said 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 his liability for the falsehoods he may have told.

23. The principle also appears from a passage in the judgment of Rix LJ in *Axa Sun Life Services plc v Campbell Martin Ltd* [2011] EWCA Civ 133, at [94] where having reviewed a number of authorities, he said:

No doubt all such cases are only authority for each clause's particular wording: nevertheless it seems to me that there are certain themes which deserve recognition. Among them is that the exclusion of liability for misrepresentation has to be clearly stated. It can be done by clauses which state the parties' agreement that there have been no representations made; or that there has been no reliance on any representations; or by an express exclusion of liability for misrepresentation. However, save in such contexts, and particularly where the word 'representations' takes its place alongside other words expressive of contractual obligation, talk of the parties' contract superseding such prior agreement will not by itself absolve a party of misrepresentation where its ingredients can be proved.

24. On this basis Mr Toledano submitted that clear words were needed to exclude liability for misrepresentation and that a broadly expressed waiver of rights in a clause dealing with contractual rights (Clause 9) was not sufficient. There was no clause acknowledging that no representations had been made and no clause excluding liability for such misrepresentation. Furthermore in Clause 7.3, there was an express acknowledgment that the Buyer had entered into the SPA in reliance on the representations in the 'Sellers' Warranties'.

25. The language of Clause 9, and in particular Clause 9.10 on which the Sellers relied, with its repeated use of the word ‘breach’ or ‘breached’ was the language of contractual obligation and was not the type of language one would expect to see used if it were sought to exclude a claim for misrepresentation, see the *Axa Sun Life* case (above) at [80]-[81].
26. Additionally, Clause 17 reserved rights ‘provided by law’, as a misrepresentation claim would be; and if it were intended to exclude such claims one would expect to see a reservation for cases of fraud as one sees in Clause 21.3.
27. Although the primary way in which the misrepresentation case was put was based on the contents of Schedule 2, for the purposes of Part 24 it was at least arguable that language used in drafts circulated in the course of negotiations was capable of amounting to a representation, see the views of Rix LJ in *Eurovideo Bildprogramm GmbH v. Pulse Entertainment Ltd* [2002] EWCA Civ 1235 at [20], despite the doubts expressed by Lloyd LJ in *Leofelis and another v. Lonsdale Sports Ltd and others* [2008] EWCA Civ 640 at [141].
28. On the second point, Mr Toledano submitted that Clause 9.3.3 (like the rest of Clause 9) was a provision dealing with contractual claims and did not apply to claims for misrepresentation. There were good commercial reasons for not limiting the recoverable damages in cases of misrepresentation: such a claim presupposes an antecedent culpability, and the award of damages might well exceed the damages awarded for breach of contract.

#### **The Claimants’ (Sellers’) argument**

29. The Sellers (by Mr Karia) submitted that the SPA was a carefully negotiated contract which balanced the potential liability of each party. The Sellers’ Warranties in Clause 7 and Schedule 2 were matched by the Buyer’s Warranties in Clause 8 and Schedule 1; and the Sellers’ obligation to indemnify in Clause 9.1 was matched the Buyer’s obligation in Clause 9.2, with the provision in Clause 9.3 applying to both ‘indemnifying’ parties. In each case the parties’ Warranties were defined in the Interpretation Clause (Clause 1), as being ‘the representations and warranties’ as set out in the applicable schedule. Whether expressed as a representation or a warranty the statements in Schedule 2 were statements of fact and it could not have been intended that such radically different results might arise depending on the cause of action.
30. However framed, the misrepresentation claim falls squarely within Clause 9 of the SPA, and in particular the Limitation Clause 9.3.3.
31. Mr Karia also relied on the broad statements of principle from the Supreme Court in *Rainy Sky SA v. Kookmin Bank* [2011] 1 WLR 2900 that commercial contracts should be construed in accordance with business common sense, rather than with too precise a focus on technical interpretations and niceties of language; and on the observations of Lightman J in *Inntrepreneur Pub Co Ltd v. East Crown Ltd* [2000] 2 Lloyds Rep 611 at [7] that the purpose of entire agreement clauses was:

... 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.

32. He submitted that this was precisely the purpose of Clauses 9.10 and 21. These provisions, when read together, showed that the intent of the parties was a mutual agreement not to make claims against the other in respect of pre-contractual negotiations, with all remedies being confined to the terms of the SPA.

### **The relevant test**

33. So far as relevant to the present applications, Part 24 of the CPR provides that a Court may give summary judgment where it considers that a party has no real prospect of succeeding on the claim or counterclaim (or part of the claim or counterclaim), and there is no other compelling reason why the case should be disposed of at trial. A similar approach underlies the strike out jurisdiction.

In the present case the parties are agreed that the application raises a short point on the construction of the SPA and no evidence is likely to throw light on the proper determination of the issues.

### **Conclusion**

34. The Court's approach to construing the provisions of a commercial agreement has recently been set out by the Supreme Court in *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50 in the judgment of Lord Clarke of Stone-cum-Ebony JSC, with whom the other members of the Court agreed, at [21]:

The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.

35. I do not accept the broad submission of the Buyer that exclusion and limitation clauses are to be construed restrictively. As Moore-Bick LJ put it in *Tradigrain SA and others v. Intertek Testing Services (ITS) Canada Ltd and another* [2007] EWCA Civ 154 at [46]:

It is certainly true that English law has traditionally taken a restrictive approach to the construction of exemption clauses and clauses limiting liability for breaches of contract and other wrongful acts. However, in recent years it has been

increasingly willing to recognise that parties to commercial contracts are entitled to apportion the risk of loss as they see fit and that provisions which limit or exclude liability must be construed in the same way as other terms: see, for example, *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 ...

See also the judgment of Moore-Bick LJ in *Whitecap Leisure Ltd v. John H Rundle Ltd* [2008] EWCA Civ 429 at [20].

36. Nor does any residual hostility apply to clauses which attempt to limit the liability of parties to a fixed financial amount. As Lord Wilberforce said in *Ailsa Craig Fishing Co Ltd v. Malvern Fishing Co Ltd* [1983] 1 WLR 964 at 966H:

Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion: this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives, and possibly also the opportunity of the other party to insure.

37. In my judgment the provisions of the SPA with which I am concerned involved a calculated allocation of risk and remuneration. If the Buyer's submissions were correct the allocation of risk and reward would depend on the way in which a party framed its cause of action. A similar point arose in *Bottin (International) Investments Ltd v. Venson Group Plc* [2004] EWCA Civ 1368 where Peter Gibson LJ, giving the judgment of the Court said at [65]:

... to my mind it makes no commercial sense for the Agreement to impose conditions as to the giving of notice of a breach of warranty and as to the commencement of proceedings for such breach and limiting the maximum liability if Bottin was intended to be left free of those conditions and those time limits and the limits on liability by treating the same warranties as representations. [Counsel] was, in my judgment, plainly right to submit that the obvious commercial purpose in the conditions and limits was to enable the Warrantors to know that they would not be sued on the warranties if no notice was served in time and proceedings were not brought in time and that, if they were sued, there was a quantified limit to their liability. That purpose would be frustrated if the claim for breach of warranty could be regarded as a claim in misrepresentation ...

38. I recognise that a claim for negligent misrepresentation involves an allegation of fault and involves a different measure of damages, but it seems to me that a court should at least have in mind the contractual allocation of risk and reward when deciding whether the parties are to be taken to have intended that claims for misrepresentation based on the same facts as give rise to the claim for breach of warranty are to fall entirely outside the confined liability prescribed by the SPA.

39. I am doubtful that a representation which only appears in a contract can fall within the terms of s.2(1) of the Misrepresentation Act 1967 in the light of the wording of the statute, however it is unnecessary to decide the point; and I proceed on the basis that the misrepresentation claims are properly arguable subject to the contractual issues.
40. Turning then to the terms of the SPA, I am also doubtful as to whether it is generally helpful to spend too much time considering how a contract would, or could, have been better expressed if the other side's construction were correct: this type of dispute does not come before the court if the drafting is clear.
41. Clauses 1.1 and 7.1 refer specifically to the contents of the Sellers' Warranties set out in Schedule 2 as being both representations and warranties; and Clause 7.1 refers to the truth and accuracy of the Sellers' Warranties which emphasises their nature as both warranties and representations.
42. In the light of the other provisions of the SPA, I do not read Clause 7.3 as an acknowledgement by the Sellers that the Buyer was relying on contractual or pre-contractual representations appearing in the Seller's Warranties, but rather as an acknowledgment that the Buyer was relying on the Sellers' Warranties in Schedule 2, rather than anything else.
43. Clause 9.10 makes clear that claims for breach of the 'Sellers' Warranties' were confined to Clause 9; and together with other terms indicates that such claims are to be confined to contractual claims.
44. While Clause 17 acknowledges the parties' contractual rights do not exclude rights and remedies 'provided by law', that does not mean that the parties are unable to exclude or confine rights and remedies provided by law, including claims for misrepresentation. The issue is whether viewed as a whole the SPA has that effect.
45. The intent of Clause 21.1 (the Entire Agreement Clause) was to make clear that (subject to the exception of fraud) the parties' rights were confined to those arising under the negotiated SPA; and Clause 21.2 emphasises the point by making it clear that rights in respect of 'warranties and representations (whether written or oral) not expressly set out in [the SPA]' were waived.
46. It seems to me to be an uncommercial reading of this provision to construe it as permitting a claim to be brought without limitation of liability based on an infraction of the Schedule 2 obligations on the basis that the claim is brought under the 1967 Act, see the *Bottin (International) Investments Ltd* case above.
47. While the comments of Rix LJ referred to above at [23] plainly apply to clauses like Clause 21.1 with its reference to 'understandings' being superseded, Clause 21.2 viewed in the light of the other contractual terms provides further strong support for the argument that claims for misrepresentation were excluded. The SPA provided an agreement that there were no representations beyond those contained in Schedule 2 and that the rights in relation to those representations were to be contractual rights, within the limitations of the SPA.
48. I have therefore concluded that the Claimants are correct in their argument on point 1.

49. If I had found that the Buyer was able to bring a claim for misrepresentation under the Misrepresentation Act 1967, I would have concluded that such a claim was covered by the limitation on recovery in Clause 9.3.3. The claims for misrepresentation are all based on the representations set out in Schedule 2. The untruths or inaccuracies of these constitute breaches of Sellers' Warranties within the meaning of Clauses 7.2, 9.1.1 and 9.10, with damages for such breach being limited as set out in Clause 9.3.3, see the *Bottin* case (above).