

Entire Agreement clauses and the requirement of reasonableness

Axa Sun Life Services Plc v Campbell Martin Limited (2011) EWCA Civ 133 Court of Appeal: Stanley Burnton, Wilson & Rix LJ

Background

This case concerned appeals against orders made on the trial of 4 preliminary issues relating to the construction of standard form agreements made between Axa and companies appointed as its authorised representatives and the guarantors of one of those companies.

The first issue was whether, on its true construction, the entire agreement provision contained in Clause 24 of the agreements precluded the defendants from relying on alleged misrepresentations and/or breaches of collateral warranty pleaded by way of Defence & Counterclaim.

By the time of the hearing before the Court of Appeal, it was common ground that Clause 24 was effective to exclude collateral warranties. However, reserving their right to argue before the Supreme Court that the case of *Springwell Navigation Corp v J P Morgan V Chase Bank (2010) EWCA 1221* was wrongly decided, the Respondents contended before the Court of Appeal that clause 24 was insufficiently clear and unequivocal to exclude misrepresentations or liability for them.

Issues 2 and 3 concerned the effect of a no set-off clause and a conclusive evidence clause. Neither issue was itself disputed by the Respondents before the Court of Appeal. However Issue 4, which concerned the impact of Sections 3, 8 and 11 of the Unfair Contract Terms Act 1977, still fell to be determined in the context of the entire agreement, no set-off and conclusive evidence clauses. The question for the purposes of Issue 4 was whether the disputed clauses satisfied the requirement of reasonableness.

Issue 1: the effect of the entire agreement clause.

Rix LJ analysed Clause 24 which he broke down into 4 numbered parts.

The clause provided:

"(i) 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. (ii) Without prejudice to any variation as provide in clause 1.1, (iii) 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 (iv) but this will not affect any obligations in any such prior agreement which are expressed to continue after termination."

In the view of Rix LJ, the Clause 24 did not exclude liability for misrepresentations of any kind. He viewed Clause 24 as being concerned only with matters that had been agreed between the parties but not with misrepresentations at all. He observed that three of the numbered parts of the clause dealt directly with the substance of the agreement or, in the case of part (iv), with matters carved out of the agreement and separately preserved. Consistently with this approach Rix LJ concluded that collateral warranties were excluded.

Stanley Burnton agreed with Rix LJ's reasoning and added that he had difficulty in seeing how a written agreement could "supersede" a representation that did not relate to the terms of the agreement.

A separate question arose with regard to whether Clause 24 excluded the implication of terms into the Agreements. By way of example, in the *Campbell Martin* case, it was contended that AXA would process all business submitted to it with reasonable care and without any unreasonable delay.

Stanley Burnton LJ having observed that the Defendants alleged that the terms were to be implied in order to give business efficacy to the agreement, drew a distinction between terms which were intrinsic to the agreement and those which were not. Terms implied to give business efficacy were intrinsic and were true implications and, therefore, were covered by the words *"This Agreement and the Schedules and documents referred to herein"*. As such they were not excluded. By contrast implied which were extrinsic to the Agreements were excluded by Clause 24.

Issue 4: did the clauses satisfy the reasonableness test?

The court having decided that there was no exclusion of liability to misrepresentation, it was unnecessary to consider Section 3 of the Misrepresentation Act 1967. The court was only concerned, therefore, with the Unfair Contract Terms Act 1977.

With regard to the entire agreement clause, the judges agreed that the clause was reasonable. Such clauses are common in agreements of the type. The clause was "*well sign-posted*" and any agent who was unhappy with the terms of the Agreement could give only 2 months notice to terminate.

Similarly the court held that the conclusive evidence clauses were reasonable. In this regard, there was an exception in the case of manifest errors. Such errors, it was decided ought to be easily identified. Where there were disputed, the court could decide.

However, both Stanley Burnton and Rix LJ agreed that the no set-off clause fell foul of the reasonableness test. AXA had failed to explain which such a clause was necessary and it operated only as against the Defendants. It seems that a want of mutuality in the operation of this clause tipped the balance in favour of the Defendants on this part of the argument.

Comment:

This case is interesting in that it illustrates the need carefully to analyse the precise wording of a clause which purports to restrict a party's right to look outside the terms of a written agreement. Clear language will be needed to prevent a party from relying on alleged misrepresentations.

Similarly, the case reminds is that an appropriately worded entire agreement clause can exclude the implication of some terms. However, where terms are intrinsic to the agreement, the exclusion must be sufficiently specific.

Finally, the impact of the Unfair Contract Terms Act 1977 needs to be considered even where an entire agreement clause appears not to amount to an exemption clause since a pre-contractual representation may still affect the performance which was reasonably expected of a party such that the clause is caught by Section 3(2)(b)(i).

In this case, three out of the four clauses in issue passed the test. The fourth failed because the party relying upon it did not justify the inclusion of a one-sided provision.