Entire agreement clauses

Careful drafting required

In *Axa Sun Life Services plc v Campbell Martin Ltd and others*, the Court of Appeal considered, among other things, the construction of an entire agreement clause in a standard form agreement (the agreement) entered into between AXA and its appointed representatives (the defendants) (*[2011] EWCA Civ 133*) (*see box "Entire agreement clauses"*).

The decision reinforces the importance of using clear and unequivocal wording to preclude claims for misrepresentation and highlights the risks of relying only on a simple form of entire agreement clause. It also raises some interesting questions about the exclusion of implied terms.

Entire agreement clause

Clause 24 of the agreement provided that:

"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."

All parties accepted that, as a matter of construction, the clause was effective to exclude collateral warranties. The court had to decide whether, on its true construction, clause 24 precluded the defendants from relying on the misrepresentations and/or implied terms alleged in their defences.

Entire agreement clauses

All entire agreement clauses are intended to prevent the parties to a written agreement from raising claims that pre-contractual statements constitute additional terms of the agreement or some kind of side agreement (for example, a collateral warranty). Most entire agreement clauses also include wording intended to prevent claims for misrepresentation. (*For a detailed explanation of these clauses, see* PLC *Commercial practice note "Contracts: entire agreement clauses", www.practicallaw.com/3-503-7049.*)

Liability for misrepresentation

The Court of Appeal (unanimously) found that clause 24 did not preclude a claim in misrepresentation, even though it expressly referred to "representations".

Rix LJ (whose reasoning Stanley Burnton LJ adopted) subjected clause 24 to a detailed semantic analysis and concluded that, in the context of the wording of the clause and the surrounding provisions, the reference to "representations" was concerned with representations which, but for clause 24, it might be argued had become terms of the agreement. It was not concerned with (mis)representations in the sense of inaccurate statements on which a party relies, but which are not terms. In particular, the word "representations" appeared in the context of a provision which was otherwise comprised of words of contractual import (promises, agreements … undertakings or implications).

While Rix LJ accepted that all the cases in this area were only authority for the interpretation of the particular clause with which they were concerned, he found that certain themes emerged which confirmed his conclusion on the correct interpretation of clause 24.

In particular, the authorities established that the exclusion of liability for misrepresentation has to be clearly stated. This can be done by agreeing that there have been no representations made, that there has been no reliance on any representations or by an express exclusion of liability for misrepresentations (each of which Rix LJ described as a "traditional" way in which liability for misrepresentation has been sought to be avoided). However, reference to an agreement superseding prior agreements was not, of itself, enough to exclude liability for misrepresentation.

Rix LJ described as "sound" Ramsey J's analysis in *BSkyB v HP Enterprise Services UK Ltd* that, in the context of an entire agreement clause, references to "representations" should be interpreted as representations which would otherwise become terms of the agreement and not representations for all purposes: to achieve that, the language had to go further (*[2010] EWHC 86*) (*see Opinion "BSkyB v EDS judgment: read and learn", www.practicallaw.com/8-501-5276*).

Implied terms

On the issue of the alleged implied terms, Stanley Burnton LJ (with whom the other judges agreed) found that

This article first appeared in the May 2011 issue of PLC Magazine.

terms which needed to be implied to give business efficacy to the agreement (as was alleged in this case) were "intrinsic" to the agreement and were "true implications". Such "intrinsic" implied terms were covered by the expression "This Agreement and the schedules and documents herein" in the first sentence of clause 24. They were not "prior" to the agreement and were therefore unaffected by the second sentence of clause 24.

On the other hand, terms which might be implied as a result of matters "extrinsic" to the agreement would be excluded by clause 24. Stanley Burnton LJ added one further comment: "The Agreement might have included, but does not include, an express specific exclusion of such [intrinsic] implied terms". He did not elaborate on the distinction between "intrinsic" and "extrinsic" implied terms.

Impact of the decision

For those drafting agreements, the message is that while an entire agreement clause can be relied on to preclude claims for collateral warranty, it should not be relied on to preclude claims for misrepresentation, which should be the subject of a separate bespoke provision including some or all of the "traditional" features identified by Rix LJ.

More generally, the more purposive approach to the construction of contracts which has been evident in a number of recent decisions (and which reached its high-water mark in *Chartbrook v Persimmon [2009] UKHL 38*) cannot be relied on to come to the rescue of a poorly drafted exclusion clause (*see News brief "The exclusionary rule: Hoffmann's last word", www.practicallaw.com/0-386-6895*). The courts will adopt varying degrees of strict construction depending on the nature of the provision under consideration. The more valuable the right sought to be modified or excluded, the clearer the language will need to be.

The distinction made by Stanley Burnton LJ between "intrinsic" and "extrinsic" implied terms is not clear. Whether a term is implied for reasons of business efficacy will depend, to a degree, on consideration of the surrounding circumstances, and it is difficult to see how a term implied from usage or custom is not intrinsic to an agreement.

In *Exxonmobil Sales & Supply Corporation v Texaco Ltd*, the High Court held that an entire agreement clause which expressly referred to "usage" and "course of dealing" precluded an implied term based on trade custom (*[2003] EWHC 1964 (Comm)*). However, the judge (obiter) found it arguable that the clause did not preclude an implied term based on business efficacy, because such a term would be found in the agreement itself.

It seems likely that Stanley Burnton LJ was using the word "extrinsic" to distinguish terms implied by reference to matters such as usage or custom or a previous course of dealing (as in *Exxonmobil*) from implied terms based on business efficacy (and presumably also terms implied to represent the obvious but unexpressed intention of the parties).

Stanley Burnton LJ's (obiter) suggestion that an agreement might expressly exclude "intrinsic" implied terms raises the question of whether the parties would ever agree to such an exclusion.

They may be tempted, given that some recent decisions, notably *Attorney General of Belize and others v Belize Telecom Ltd* suggest that the constraints on implying terms may not be as strict as they once were (although there has since been some rowing back) (*[2009] UKPC 11*) (*see also News brief "Implied terms in contract: only one question to ask", www.practicallaw.com/4-385-9968*). Certainly, the line between giving effect to the parties' intentions by implying a "necessary" term, and writing a new term into an agreement because it seems reasonable to do so, can be a fine one.

However, a desire to ensure that the contract works in practice, and the fact that neither party will know at the time the contract is signed whether they will benefit or suffer from the exclusion in the event of an unexpected contingency, are good reasons not to exclude such implied terms.

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This article first appeared in the May 2011 issue of PLC Magazine.