

“Threshing the undergrowth for some chance remark” – English High Court considers impact of entire agreement clauses on pre-contractual negotiations

Introduction

Claims alleging pre-contractual misrepresentation are common nemeses of banks and other financial institutions, and any organisation that regularly contracts with counterparties. As the 2018 World Cup gets under way, football (more specifically, the ownership of Nottingham Forest FC) was an appropriate context for the English High Court to have considered the extent to which such claims can survive the contractual protection of entire agreement clauses, in a decision which appears at first sight to sit uneasily with previous Court of Appeal authority in this area.

Background

Entire agreement clauses will be familiar to anyone who has negotiated, drafted or reviewed a contract as one of the most significant – and commonly litigated – “boilerplate” provisions of a contractual document. Their aim is simple: the parties to a written contract agree that the terms of that written document constitute the entirety of the parties’ agreement, and there can be no future claim that pre-contractual statements and representations not included in the written instrument in fact constitute additional terms of the contract, or a side agreement. In the oft-quoted words of Lightman J, entire agreement clauses aim “to preclude a party to a written agreement threshing 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”¹.

Without an entire agreement clause, promises or assurances made in the course of negotiations might be deemed to have effect as collateral warranties; the effect of the entire agreement clause is that such promises or assurances shall have no contractual force, save insofar as they are reflected and given effect in the contractual document. As the Court of Appeal held in 2011², if the final written agreement contains an effective entire agreement clause, it will prevent the parties from claiming that the contract is partly contained in statements that were not included in that agreement.

The value of entire agreement clauses will be obvious; they strive to achieve certainty as to the terms and scope of the relevant contract. The impact of such clauses on claims for misrepresentation is less certain. Where litigants have sought to rely on “pure” entire agreement clauses (i.e. which do not also contain additional “non-reliance” statements) to defend themselves against claims for misrepresentation, the courts have historically been unsympathetic. Since at least the early 1980s³, the prevailing view of the courts has been that such arguments should fail: denying contractual force to a statement does not affect its status as a misrepresentation. The Court of Appeal confirmed this approach in 2011 in *AXA Sun Life*.

¹ *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd’s Rep 611

² *AXA Sun Life Services plc v Campbell Martin Ltd* [2011] EWCA Civ 133

³ *Deepak; Alman & Benson v Associated Newspapers Group Ltd*, 20 June 1980, unreported

The NF Football Investments v NFFC case⁴

It was in this context that the High Court's recent decision in *NF Football Investments v NFFC* was, perhaps, somewhat surprising. The case concerned the terms of a share purchase agreement, pursuant to which the first claimant had purchased the shares of Nottingham Forest Football Club Limited from the first defendant, NFFC. The claimant alleged that a document provided to it by the defendant during the negotiations leading up to the purchase understated the liabilities of the club by more than £3.5 million, and sought (amongst other relief) damages for misrepresentation under section 2(1) of the Misrepresentation Act 1967.

The share purchase agreement contained an entire agreement clause, which provided as follows:

"This agreement (together with the documents referred to in it) constitutes the entire agreement between the parties and supersedes and extinguishes all previous discussions, correspondence, negotiations, drafts, agreements, promises, assurances, warranties, representations and understanding between them, whether written or oral, relating to its subject matter."

The clause neither negated reliance, nor excluded liability although, elsewhere, the share purchase agreement stated that *"except as expressly provided"*, the rights and remedies provided thereunder were *"in addition to and not exclusive of any rights or remedies provided by law"*.

Notwithstanding the Court of Appeal's authority in *AXA Sun Life* that entire agreement clauses rarely exclude liability for misrepresentation, and the contractual preservation of rights and remedies at law in the present case, the defendants argued that the entire agreement clause in the share purchase agreement precluded the claim for misrepresentation.

Master Bowles agreed. The parties had, in his view, by the wording of the entire agreement clause, intended to exclude claims for misrepresentation, given the deliberately wide terms used, which *"do not necessarily, or even obviously, embrace matters of an exclusively contractual nature"*. This view was, in part, based upon the fact that the parties had *"set up contractual procedures to deal with claims likely to arise under and in respect of the [share purchase] agreement within the four walls of the agreement"*. In particular, the share purchase agreement provided the claimant with an indemnity against all losses suffered *"arising out of or in connection with aggregate of"* the club's liabilities in excess of the liabilities value stated in the due diligence (so, dealing precisely with the scenario that then transpired) and, elsewhere, an indemnity in respect of losses suffered or incurred by reason of any misstatement or misrepresentation by the defendant as to certain specifically identified issues that would, or could, have the effect of increasing the club's liabilities. Master Bowles considered, therefore, that these contractual mechanisms for dealing with misrepresentations reflected the parties' intention that those mechanisms should be the exclusive forum for such complaints.

The specific contractual language used by the parties in the share purchase agreement in *NF Football* (which included, in the entire agreement clause, references to *"negotiations"*, *"assurances"* and *"representations"*; i.e. matters of a less contractual nature than *"agreements"*, *"promises"* and *"warranties"*, for example) distinguished it from *AXA Sun Life*, in which a distinction was made between the definition of contractual obligations and the exclusion of liability for misrepresentation. While Master Bowles acknowledged Rix LJ's finding in *AXA Sun Life* that an exclusion of liability for misrepresentation must be clearly stated (for example by a non-reliance clause), this did not mean that *"an effective clause purporting to exclude liability for misrepresentation must, as a matter of law, or construction, be set out in a particular form"*. What matters is the context and construction of the clause in question.

⁴ *NF Football Investments Limited and another v NFFC Group Holdings Limited and another* [2018] EWHC 1346 (Ch)

The effect of this finding was that the claimants' claim for misrepresentation failed, and was struck out in a summary judgment; the entire agreement clause provided a complete defence to the misrepresentation claim.

Key points to note

Does *NF Football* reflect a change of approach to interpreting entire agreement clauses? Plainly, this was an unusual decision; until now, attempts to rely on entire agreement clauses as a defence to misrepresentation claims have routinely failed, with the courts requiring clear wording in order to exclude or limit liability for misrepresentation. In *NF Football*, there was no such clear wording. Master Bowles' finding was, however, the result of the interpretation of the specific contract in question. Contractual interpretation will, said Master Bowles, always depend upon the particular language used and the context of such usage. This premise allowed him to depart from the authority in *AXA Sun Life*, and this reflects perhaps the key point to note from the case; namely, that the interpretation of a contract's entire agreement clause will be specific to the wording of the contract in question.

For contracting parties looking to protect themselves against misrepresentation claims, relying on a "pure" entire agreement clause may well be insufficient, notwithstanding the *NF Football* decision (which, it should be remembered, is a first instance decision); rather, the party should include "non reliance" or "no representation" wording which, as confirmed elsewhere by the Court of Appeal, will give rise to a contractual estoppel against a misrepresentation claim.

If you have any questions or comments in relation to the above, please contact Alistair Graham or James Whitaker, or your usual Mayer Brown contact.

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