Relying on Non-Reliance

Introduction

This article examines the latest approach of the courts to "acknowledgments of non-reliance" and the related development of the doctrine of contractual estoppel. As will be seen, the recent case law in this area has predominantly concerned misselling claims by investors against financial institutions.

The number of "bank-friendly" decisions which have recently emerged would seem to indicate a judicial desire to give effect to the contractual agreements which parties have made. Whether or not such an approach is appropriate in the arena of unsophisticated investors is to be doubted however and it will be interesting to see how the case law in this area is developed.

What is an "acknowledgment of non-reliance"?

"Acknowledgments of non-reliance" or "non-reliance clauses" (**NRCs**) are statements within a contract which attempt to prevent one of the parties to the contract from relying upon certain representations which may have been made by the other party prior to entry into that contract. The aim of such a clause is therefore to exclude a claim for misrepresentation, one element of which is to successfully demonstrate that a party has placed reliance upon a pre-contractual representation.

NRCs will often appear within an entire agreement clause in a contract and although there is no standard form for such a clause, they tend to include a statement to the effect that one party does not rely upon any statements and/or representations made by the other party when entering into the contract.

Although an effectively worded non-reliance clause can potentially oust a claim for innocent or negligent misrepresentation, for policy reasons, it is not possible for such a clause to exclude liability for fraudulent misrepresentation[1].

Traditional Judicial approach

Historically, effective NRCs have been held capable of evidentially estopping the representee from relying upon pre-contractual statements made to him by the other party. The early case law suggests that an evidential estoppel may arise in circumstances where the following three requirements have been met:[2]

1. The NRC contains a **clear and unambiguous** statement;
2. The party that made the statement intended the other party to act upon it;
3. The party that received the statement believed in the truth of the statement and acted upon it.

Although in the past, requirements (1) and (2) were often fairly self-evident given that the acknowledgment of non-reliance featured in a document with contractual force, requirement (3) was often far more difficult for parties to demonstrate, given that frequently one party to the contract knows very well that statements it has made will have been relied upon by the other party. As a result of the difficulty of proving limb (3), the courts have sought to develop

[1] **FoodCo and Others v Henry Boot** [2010] EWHC 358.
[2] **Lowe v Lombank** [1960] 1 W.L.R 196.

the doctrine of contractual estoppel as a way of holding parties to the contractual bargain which they have struck.

Peekay Intermark Limited v Australia and New Zealand Banking Group[3]

The Court of Appeal's decision in Peekay marked a significant change in judicial attitude towards NRCs. In Peekay, the first claimant (Peekay), a company controlled by the second claimant (experienced investor, Mr Pawani) bought an investment product from the defendant (ANZ). The product was a note linked to Russian Government Bonds (GKOs). In a telephone conversation with an employee of ANZ, Mr Pawani had wrongly been led to believe that if Peekay bought the product, that it would end up with an interest in a GKO. Mr Pawani was then sent documentation including a Risk Disclosure Statement, which he was asked to sign. This Risk Statement included the following statements:

"*You should also ensure that you fully understand the nature of the transaction and contractual relationship into which you are entering… The issuer assumes that the customer is aware of the risks and practices described herein, and that prior to each transaction the customer has determined that such transaction is suitable for him*."

"*[Client] confirms it has read and understood the term of the Emerging Markets Risk Disclosure Statement as set out above*".

Even though Mr Pawani had merely glanced at the contents of the documents before signing, the Court found that statements made in the investment documentation contractually estopped Peekay from saying that it did not understand the nature of the transaction as described in that documentation. As a result, Peekay was unable to assert that it was induced to enter into the investment contract as a result of a misunderstanding of the nature of the investment as a result of what ANZ's representative had said to Mr Pawani in the earlier telephone conversation.

Subsequent Approach

Subsequent authorities have taken the principle in Peekay further and held that parties to a contract may agree that one party has not made any pre-contractual representations to the other about a particular matter, or that such representations have not been relied upon by the other party, even if they both know that such representations have in fact been made or relied upon and that such an agreement may give rise to a contractual estoppel.[4]

If a term is to be construed as having this effect, the cases show that clear wording is required and that in each case it will be a matter of construction of the particular contract as to whether the facts demonstrate that one party should be contractually estopped from denying a particular state of affairs which he has previously agreed and signed up to. To this end, and somewhat unhelpfully, little guidance has been provided by the courts as to the form of words that ought to be used in order to ensure that a contractual estoppel will arise.

As well as precluding a claim for misrepresentation, the case law in this area also suggests that the effect of a contractual estoppel can be to prevent a party from alleging facts in support of the existence of a duty of care which are inconsistent with the terms of the relevant provisions.[5]

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[3] [2006] EWCA Civ 386
[4] **Cassa di Risparmio v Barclays Bank** [2011] EWHC 484 (Comm)
[5] **Titan Steel Wheels Ltd v Royal Bank of Scotland plc** [2010] EWHC 211

Approach towards less sophisticated investors

Although the majority of cases in this area have concerned financial institutions and complex products, the recent case of **Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland**[6] has commented on the application of the doctrine of contractual estoppel to less commercially experienced individuals.

In that case, it was suggested that if a representation was made to a less sophisticated commercial party and then the parties agreed that the basis of the contract was that no such representation had been made, the court might view this as an attempt to exclude liability for misrepresentation and therefore subject to section 3 of the Misrepresentation Act 1967. The relevance of the Misrepresentation Act being applicable is that the clause will only be of effect to the extent that it satisfies the requirement of reasonableness under the Unfair Contract Terms Act 1977, one element of which is the respective bargaining powers of the contractual parties.

Whether a clause would fall within the ambit of section 3 is said to largely depend upon whether the "*clause attempts to rewrite history or parts company with reality*", which arguably is more likely to be the case with a contract involving an unsophisticated party than a commercial contract between sophisticated individuals/entities.

Although this area of the case law is currently undeveloped, it may well be that the courts utilise the test of reasonableness to prevent the contractual estoppel doctrine applying in circumstances where it would be unjust for it to do so.

Conclusion

The most recent case law on the applicability of NRCs and the doctrine of contractual estoppel has concerned claims against large financial institutions by largely sophisticated, experienced investors. These cases have been "bank-friendly" in nature, with the courts choosing to respect the contractual freedom and autonomy of the parties, who as a result have been prevented from asserting facts which contradict the terms they have agreed.

While there may be good reason, such as commercial certainty, for permitting sophisticated businessmen to agree with others the facts upon which their business agreement is to be based, there is arguably scope for the contractual estoppel approach to produce unfair results in cases concerning NRCs which less sophisticated investors have signed up to. As the case of Raiffeisen suggests however, it may well be that the courts will find ways to depart from the developing contractual estoppel principles in circumstances where unsophisticated individuals are concerned, most likely by adopting an approach based on reasonableness under UCTA.

[6] [2010] EWHC1392