

There's no basis for that – exclusion clauses, contractual estoppel and misrepresentation

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The Decision

1. In *First Tower Trustees Ltd and Intertrustees Limited v CDS (Superstores International) Limited* [2018] EWCA Civ 1396, the Court of Appeal held that any term in a contract that a party sought to use to establish a contractual estoppel defence to a claim under the Misrepresentation Act 1967 fell within section 3 of that Act, and accordingly had no effect unless it satisfied the requirement of reasonable as set out in Section 11 of the Unfair Contract Terms Act 1977.

3PB's Analysis

2. The claim related to the lease of commercial bays by the Appellant landlords to the Respondent tenant. Unknown to the tenant but known to the landlords or their agents, the bays were so contaminated with asbestos that they were dangerous to enter.

3. At first instance the judge found that the landlords were liable for misrepresentation under the Misrepresentation Act 1967 for replies to enquiries before contract, and in particular, a failure to pass on information that the bays were contaminated with asbestos after the landlords' agents received a copy of a report indicating there was in fact asbestos in the bays.

4. One of the defences raised by the landlords was that clause 5.8 of the various leases of the bays prevented the tenant from claiming that it had relied on the misrepresentations they had made. Clause 5.8 stated:

"The tenant acknowledges that this lease has not been entered into in reliance wholly or partly on any statement or representation made by or on behalf of the landlord"

5. The tenants countered that clause 5.8 was a term which fell within s.3(1) of the Misrepresentation Act 1967, and was not reasonable and so had no effect. Clause 3(1) states:

(1) If a contract contains a term which would exclude or restrict—

(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or

(b) any remedy available to another party to the contract by reason of such a misrepresentation,

that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract



Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does.

6. The landlords' response that clause 5.8 was a 'basis clause' that did no more than define the terms upon which the parties were conducting their business. Accordingly, it was not a clause that sought to exclude or restrict liability, but rather a clause which established the tenant had not relied on any representations.
7. The judge agreed with the tenant, and further found that the clause was not reasonable. As such, it had no effect. The landlords appealed.
8. As the Court of Appeal noted, it is now firmly established at its level in the judicial hierarchy that parties can bind themselves by contract to accept a particular state of affairs even if they know that state of affairs to be untrue. This is a particular form of estoppel which has been given the label "contractual estoppel". Unlike most forms of estoppel it requires no proof of reliance other than entry into the contract itself. Thus as a matter of contract parties can bind themselves at common law to a fictional state of affairs in which no representations have been made or, if made, have not been relied on.
9. In recent years, such clauses, previously known as 'basis clauses', (a phrase disapproved of in this judgment,) have commonly and successfully been used by, for example, banks defending claims of financial mis-selling to set up a

contractual estoppel in respect of not giving advice when selling financial products.

10. In this case, the Court of Appeal drew a distinction between terms which established the extent of the primary obligations undertaken by a contracting party (such as whether a party was giving advice or not), and those which preclude the assertion of facts which are inconsistent with those agreed and accordingly lead to a party owing no liability in tort. In respect of the second, Leggatt LJ, who, along with Lewison LJ, gave a substantive judgment, stated at [97]:

Where a duty is imposed by law and not because it is a term of a contract agreed between the parties, the distinction between a contract term which excludes liability and one which prevents liability from arising by giving rise to a contractual estoppel is a distinction without a difference. In such circumstances it cannot be said that the contract term is merely creating and defining the extent of the parties' obligations. The term is seeking to exclude a liability which would otherwise be there.

11. To that extent, even if a contractual estoppel was established by clause 5.8, the establishment of that estoppel was still a means of excluding liability, and accordingly only stood if it was reasonable.



12. The judge further went on to say that even if a distinction could be made between exclusion and agreeing non-reliance on representations, no rational legislator could have intended that the need for a contract term could be avoided simply by “felicity in drafting a contract term.” For the Court of Appeal, it was clear that section 3(1) was intended to catch all attempts to avoid liability for misrepresentation under the Act, not simply those which stated that such liability was excluded.

13. As such, the Court of Appeal agreed with the first instance judge that section 3 applied. It further agreed that in the context of conveyancing, where pre-contract enquiries were of particular importance and were heavily relied on by conveyancers, a clause that agreed that such representations were not relied upon was not reasonable, and accordingly could not be relied upon by the landlords.

Impact of the Decision

14. The decision is useful in clarifying the limits of contractual estoppel claims, and their ability to circumvent arguments relating to exclusion clauses. Because the tort of misrepresentation under the Misrepresentation Act 1967 is part of the general law, and not an obligation created by a contract between the parties, an agreement

between parties that one party did not rely on the other’s representations was an attempt to exclude liability rather than creating a situation where such liability never arose.

15. This is to be contrasted with clauses where the parties agree that no advice has been given, as there equivalent statute for advice to the Misrepresentation Act 1976. In the latter cases, parties can still agree the basis on which they contract rather than excluding liability, and by doing so will be able to avoid the provisions of the Unfair Contract Terms Act 1977.

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This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.

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