Entire Agreement Clauses: Do They Work?
Context

- Think of them as an express parol evidence rule – cannot add to, vary or contradict, “a contract”;
- Remember exceptions to parol evidence rule;
- Similar exceptions apply plus s.46 SOGSA 1980;
- Must concede fraud – also will not work in B to C contracts.
Entire Agreement Clauses (EAC) Defined

A generic term to cover

- Clauses declaring no representations have been made
- Clauses reciting non-reliance on any representations
- Clauses reciting the document constitutes the entire agreement and no other promises, understandings or agreements have been made
- Clauses stating that this agreement supersedes all previous agreements, promises or understandings, oral or written
- Merger or integration clauses that exclude statements not integrated into the written agreement
Morality of EAC?

**For**
- Certainty – curtails litigation
- Flexibility in negotiations

**Against**
- Meaning can be obscure
- Can lead to substantial injustice
- Catch consumers/inexperienced by surprise
MacDonald Estates Plc v. Regenesis [2007] ScotCSOH 123 (Lord Reed)

- JVA between defendant and landowner that professional fees prior to planning permission (C.P) at risk of developer. Gave effect to emails containing this statement
- MSA executed between developer and defendant providing that services would be provided to JVC; clause 4.5 allowed for charging incidental expenses
- Developer concern about costs – project looking unlikely to progress. The MSA was “boilerplate” i.e. “a standard wording and non-controversial”
- Both JVA/MSA contemporaneous – each entire agreement clause
An Ethical Claim? Regenesis #2

• “Not our job to tell [the other side] the consequences of the documents that we are presenting...We assume they will pick it up...by reading the document and negotiating”

• “not my job to advertise [the opposing lawyer] is labouring under a misapprehension. I mean that’s why you hire a big law firm in Edinburgh to negotiate documents for you. I leave it to them to advise their clients”

• Not spotted by defendant’s solicitor
Regenesis #3

• Bill for £507,307.67 submitted, using MSA. Regenesis not parties to JVA

• While Court held these expenses not covered by MSA said on entire agreement clauses that the MSA EAC did not:
  • prevent a court from taking account of the JVA as part of Factual matrix of MSA – “surrounding circumstances”
  • prevent implied terms at common law
  • prevent a claim to rectification: substance – Inntrepreneur was not a rectification case, citing J.J. Huber v. Private DIY Co.
No representation clauses/non reliance

• These are vulnerable if court finds contract partly written partly oral – SR Technics (2007)

• May be incorporation problems – Beer v Townsgate I Ltd (1997) (Can)

• Will be best used in in tandem with “proper” entire agreement clauses, as in Inntrepreneur v East Crown (2001)

• S.46 SOGSS Act 1980
Inntrepreneur -v- East Crown (2001)

• Purpose to preclude a party to a written contract from threshing through the undergrowth and finding a remark upon which to found a collateral warranty – will denude a collateral warranty of legal effect

• Claim in Inntrepreneur for collateral warranty only – claim in collateral warranty not subject to S.46 SOGSS Act 1980

• But a claim in tort?
Alman & Benson -v- Associated Newspapers Group (1980)

- “The written contract” constituted the entire agreement and understanding between the parties with respect to all matters referred to herein

- Did the word “understanding” cover collateral warranties/representations?
Deepack -v- ICI (1999)

“The contract constitutes the entire agreement between the parties...there are not any agreements, understandings, promises or conditions...which are not merged into this CONTRACT and superseded thereby”

• Important Court of Appeal decision
• The clause leaves open a claim in tort
• Clauses can be both entire agreement clauses and clauses excluding (tort) misrepresentations
BSkyB v HP Enterprise Services UK [EDS] [2010] EWHC 86 (TCC)

• EDS contracted to provide customer management system for Sky for baseline budget £47.6 million – four years late for £265 million

• Protracted negotiations, changes in direction, documents – letter of intent

• EAC in November 30, 2000 – Prime Contract – (Cl. 1.3.1.), Contractors warranties (Cl.7) exclusion (Cl.20)

• November 30, 2000 Prime Contract supplemented by letter of agreement, varying it, as settlement agreement

• While there was a contract, how did this affect possible duty of care?
Clause 1.3.1 in BSkyB (EAC)

- Agreement and schedules “shall together represent the entire understanding and constitute the whole agreement...and supersede any previous discussions, correspondence, representations or agreement between the parties [notwithstanding any prior survival clause]... does not exclude liability of either party for fraudulent misrepresentation”

- EDS said (i) excluded (a misrepresentation) duty of care, (ii) overrides pre Prime Contract misrepresentation, (iii) excludes non fraudulent misrepresentations

- BSkyB said (i) clause prevents contract liability via a collateral contract but not liability in misrepresentation
Ramsay J. concluded in favour of BSkyB

- Provision is directed at previous discussions, etc. The fact that Clause 1.3.1 includes a reference to “representation” is representation qua contract, not tort.

- Stronger than Deepak/Alman and Benson (i.e. “understanding” does not equate to “representation”)

- But not as strong as Man Nutzfahrzeuge v Freightliner (2005) which was effective BECAUSE OF THE NO RELIANCE part of the clause, even in contract/tort cases, absent fraud.

- Language has “to go further”
Hostile Construction of Clause 1.3.1

• Nor did the Clause exclude a duty of care

• Nor did the clause take away a right to rely on misrepresentation

• The reference to fraudulent misrepresentation is last sentence surviving preceding part of the clause did not have a life of its own (i.e. effect an exclusion of liability for non fraudulent misrepresentations)
McGrath -v- Shah (1989)

- S.3 Misrepresentation Act 1967 “was not apt to cover a contractual provision which seeks to define where the contractual terms are actually to be found” Judge Chadwick.

- This position also supported in Inntrepreneur by Lightman J.

- Is an EAC an exemption clause?
Ravenennavi Spa -v- New Century Shipbuilding [2006] EWHC 733 (Comm)

- Earlier option agreement gave buyer opportunity to avail of cancellation

- Option agreement followed by two shipbuilding contracts containing
  “This contract contains the entire agreement and understanding between the parties and supercedes all prior negotiations, representations undertakings and agreements on any subject matter of this contract prior to signing of the contract”

- Unlike Inntrepreneur statement made but entire agreement clause effective.
Exxonmobil -v- Texaco Ltd (2002)

• Was there an express/implied term allowing re-testing of product for compliance?

• Clause – “entire agreement...there is no other promise, representation, warranty, usage or course of dealing affecting it”

• Testing – a custom or usage caught by “usage or course of dealing affecting it”

• BUT a “business efficacy” implied term would not have been excluded
Subjecting Clause to rigorous Interpretation White v Bristol Rugby (2002) and Fontana Ltd -v- Fabio (2002)

- **White v Bristol Rugby**
  “All previous agreements between the club and the player are hereby cancelled without prejudice to any rights or obligations which shall have accrued or become due”

- This clause stated *obiter*, to have no effect on oral terms negotiated simultaneously with the written contract
Fontana -v- Fabio

“This Agreement shall be in substitution for any previous letters of appointment, agreements or arrangements, whether written, oral or implied relating to the appointment of the General Managers”

- Was not an entire agreement clause
- Decision in Inntrepreneur irrelevant
- Extra pension provisions were contractual terms
Whitehead Mann Ltd -v- Cheverney Consulting (2006)

• Trial Judge and Carnwath LJ in dissent found on construction that clause did not cover events

• Side letter that varied one consultancy agreement

• Side letter not signed by appellant – three other documents signed by both parties on same occasion

• Signing some documents in the package has effect of binding parties to all documents intended to be in package
The Whitehead Mann Clause?

- This Agreement constitutes the entire agreement between the parties... and shall have effect to the exclusion of any other memorandum agreement or understanding preceding the date of this agreement.

- References to “preceding” problematical – side-letter not signed so did it “precede”?

- Trial judge found on facts that this clause not intended to operate
Collateral Contracts – Ryanair Ltd. v SR Technics Ltd. [2007] EWHC 3089 (QB)

- SR sub-lease Hangar 1 space at Dublin Airport to Ryanair subject to DAA permission on 15 year basis
- DAA only gave permission for two years – SR did not challenge
- Unsigned letter emailed to Ryanair consisted of a SR promise to seek lease for less than 15 years and on expiry seek renewal from DAA
- Could this unsigned letter be a collateral contract independent of Novation Agreement/side letters?
- SR said Ryanair “bare licensee on quantum merit” basis
Clause in SR Technics – 16.3 and 16.5

• 16.3  No alterations or amendment to this contract will be effective unless contained in a written contract signed by the authorised representatives.

• 16.5  This Contract represents the entire agreement of the parties hereto and supersedes all previous negotiations, statements or agreements whether written or oral.
SR Technics #3

- Novation Agreement and side letters did not themselves allow SR to walk away if DAA permission less than 15 years – implied terms present

- Unsigned letter basis of a collateral contract – side letter amended as a consequence to deal with the period of license as well as release of over £1 million to SR

- Like McGrath v Shah, this is a partly written, partly oral contract, unlike Deepak and Inntrepreneur

- Also it would be unconscionable to allow reliance (Brikom: S.3(b) M.A. 1967.)
Entire Agreements and Internal Promises

- As Exxonmobil holds implied terms on “business efficacy” basic cannot be excluded, law must *a fortiori* cover express terms

- **Liofelis SA -v- Lonsdale Sports** (2008)

- Trade mark license – misrepresentations that earlier licenses could be cancelled and that licensor not aware of other licenses granted

- Clause in *Liofelis* was not an entire agreement clause but one denying liability/reliance on any misrepresentations other than in the agreement
The S.46 SOGSS Act 1980 Point

“If any agreement contains a provision 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 provision shall not be enforceable unless it is shown that it is fair and reasonable”.
Scope of S.46

• Applies in business to business contracts

• Does not depend on being an exclusion clause

• Limited by S.43 in Ireland (e.g. Liofelis SA not covered)

• Onus on proferens – Liofelis SA

• Fraud must be conceded
Foodco UK v Henry Boot [2010] EWHC 358

• HB developed a motorway “service development” – not a MSA/entitled to limited highway signage, not “blue” signage for “Stop 24”

• Expectations that would be Channel Tunnel Coach transfer point and throughout estimates not met

• Tenants took leases on basis of entire agreement/no reliance clause

• Tenants variously thought Blue signage/24 Hour opening/huge site

• Estate agents acting for tenants gave misleading data
Solicitors gave different evidence on signature

• KFC – accepted signed and knew
• Game Grid – signed but did not read/understand after a negotiating process
• Food Co. – signed but statement of non reliance not true
• EAT Ltd. – believed they were leasing and MSA
• Burger King Franchise – relied on brochure silent on signage
• Interchange – principal was a solicitor who did conveyancing
Entire/non reliance Clause in Henry Boot

“This agreement constitutes the entire agreement between the parties – tenant acknowledges he is entirely on basis of hereof and not in reliance upon any representations made by or on behalf of [Henry Boot] whether written or oral, expressed or implied [save for written replies by HB solicitors in reply to enquiries raised by tenant's solicitors]”
The Statutory test of Reasonableness – S.46 SOGSSA in Henry Boot and non-reliance clauses in the context of experienced commercial parties with legal advice

- Commercial parties aspire to certainty (avoids a 12 day trial like this one)

- No substantial imbalance – each of parties a commercial and franchisee substantial concern (save for Burger King franchisee)

- Each tenant advised by a solicitor or used a solicitor

- Terms were open to negotiation

- Most importantly, the clause permitted reliance on answers to Henry Boot’s solicitors. To put a matter into a reliance context, tenant's only had to ask permission
The relevance of Estoppel – non reliance works under both – Henry Boot

- Non reliance clauses can be effective by creating:
  - estoppel by contract – if clear enough
  - estoppel by representation/evidential estoppel

- Of these, estoppel by contract is more effective. There is some authority suggesting that where the party relying on the promise will have to show a belief in the truth of the acknowledgment of non reliance (EA Grimstead, Peekay, Trident Turboprop)

- Evidential estoppel – causation is important

- E.g. proferens knows other party, has not seen or understood clause
Conclusion #1

- Does not exclude “factual matrix”/Hoffmann analysis/material;
- Vulnerable to partly written/partly oral arguments;
- Even under Inntrepreneur/rule of law analysis, courts look to the facts;
- Vulnerable to hostile judicial interpretation;
- Judges confine the clauses to contract claims, leaving tort open.
Conclusion #2

- Will not work in consumer contracts under Directive 93/13/EC;

- Unlikely to work in employment cases on the facts;

- Will not exclude statutory implied terms;

- May not exclude business efficacy implied terms.
Conclusion #3

- Section 46 SOGSA 1980 applies;

- Unlikely this section can be excluded, like fraud;

- S.46 applies in B to B contracts;

- S.46, unlike S 3 M.A. Act 1967, does not apply to land contracts, I.P. licences, etc.

End
Thank You.

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